80-608

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether 18 U.S.C. 1725, which prohibits the deposit of unstamped "mailable matter" in a letter box approved by the Postal Service, unconstitutionally abridges the First Amendment right of appellee civic associations to freedom of expression.

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OPINIONS BELOW

The opinion of the district court on remand (App. A, *infra*, 1a–12a) is not reported. The opinion of the court of appeals remanding the case to the district court (App. B, *infra*, 13a–19a) is reported at 586 F.2d 935. The original opinion of the district court (App. E, *infra*, 23a–31a) is reported at 448 F. Supp. 159.

JURISDICTION

The judgment of the district court (App. C, *infra*, 20a–21a), declaring 18 U.S.C. 1725 unconstitutional and enjoining its enforcement against appellees, was entered on May 20, 1980. A notice of appeal to this Court (App. D, *infra*, 22a) was filed on June 18, 1980. On August 6, 1980, Mr. Justice Marshall extended the time for docketing the appeal to and including October 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Fleming* v. *Rhodes*, 331 U.S. 100, 104 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

18 U.S.C. 1725 provides:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

STATEMENT

1. This case involves the question whether 18 U.S.C. 1725, which prohibits the placement of "mailable matter"

in a letter box without paying postage, may constitutionally be applied to appellee civic organizations. The statute was enacted in 1934 "to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon, by making this a criminal offense." H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934). Postal Service Regulations interpreting the statute provide (45 Fed. Reg. 56057 (1980)):[1]

> Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections * * * 1725, except that door slots, and nonlockable bins or troughs used in connection with apartment house mailboxes are not letter boxes within the meaning of 18 U.S.C. 1725 * * *.

2. The instant suit arose in 1977 when appellee Council of Greenburgh Civic Associations (an umbrella organization for a number of Westchester County civic groups) and one of the Council's member associations, appellee Saw Mill Valley Civic Association, filed suit in the United States District Court for the Southern District of New York after being advised by the Postal Service that they were subject to criminal prosecution under 18 U.S.C. 1725. The organizations had been delivering messages to local residents by placing notices and pamphlets, without postage, in letter boxes at private homes in Greenburgh, New York. Appellees contended that enforcement of the statute would interfere with the delivery of their messages and thereby deprive them of the First Amendment rights to freedom of speech and of the press.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted (App. E, *infra*, 23a–31a). Appellees appealed, and the court of ap-

[1] The regulations in effect during the litigation below were identical to the current regulations in all relevant respects (see *Domestic Mail Manual* § 151.1; App. E., *infra*, 24a–25a n.2).

peals reversed, holding that "enough is alleged in the complaint to raise the issue of infringement of freedom of communication" (App. B, *infra*, 14a). The court of appeals remanded the case to the district court to give the parties "an opportunity to submit proof as to the extent of the handicap to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other" (*ibid.*; footnotes omitted).

On remand, the Postal Service demonstrated that Section 1725 protects mail revenues, facilitates efficient and secure delivery of the mails, and promotes the privacy of mail patrons. The primary purpose of Congress in enacting the statute was to protect mail revenues; Section 1725 was intended to discourage organizations from avoiding the payment of postage by delivering their own pamphlets and circulars, while using official letter boxes as a repository. See H.R. Rep. No. 709, *supra*; 75 Cong. Rec. 5575–5577 (1932). But the testimony of postal inspectors at the evidentiary hearing showed that the statute also plays a role in the investigation of mail theft: by restricting legitimate access to letter boxes, the statute allows investigators and other observers to assume that anyone other than the postal carrier or the householder who opens a mailbox may be engaged in a violation of the law (Tr. 123–128).[2] The Postal Service also introduced evidence demonstrating that appellees had ample alternative methods of delivering their messages, such as by placing notices or pamphlets under a door or doormat or on a door knob.[3]

[2] The statute is particularly helpful in investigating thefts of government benefit checks from letter boxes in economically depressed areas (Tr. 589–591).

[3] A survey on the comparative effectiveness of different distribution methods showed (Def. Exh. D-1; Tr. 535):

METHOD USED	% OF DISTRIBUTIONS FOUND THAT WERE READ	% OF TOTAL DISTRIBUTIONS READ
Under Door or Mat	83%	59%
On Door Knob	81%	61%
In Mail Box	86%	71%

Appellees submitted evidence to show that the payment of postage would be financially burdensome to them because of their minimal resources (Tr. 22-23, 94-95, 208-209, 253) and that there are occasions when mail delivery service is too slow to satisfy their need to communicate effectively with their constituents (Tr. 22-23, 168-170, 197-199).

The district court balanced the benefits to the Postal Service[4] against the harms to appellees and concluded that "the cost to free expression of imposing this burden on [appellees] outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and protection of the mails" (App. A, *infra*, 9a). It therefore enjoined the Postal Service from enforcing Section 1725 against appellees or the Council's constituent civic associations (App. C, *infra*, 20a-21a).

THE QUESTION IS SUBSTANTIAL

The district court has declared unconstitutional, as applied to appellee civic associations, a 45-year-old, content-neutral federal statute that prohibits persons from placing "mailable matter" in letter boxes approved by the Postal Service with the intent to avoid paying the required postage. The court erred in concluding that the incidental effect of this statute on appellees' right to communicate with local residents violates the First Amendment. In light of the substantial, legitimate governmental interests served by 18 U.S.C. 1725, this Court should note probable jurisdiction to "review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).[5]

[4] The district court refused to consider the statute's benefits to the privacy interests of mail patrons on the grounds that the Postal Service could not raise such interests, and, in any event, homeowners could protect those interests by posting "no trespassing" signs or enforcing local trespass laws (App. A., *infra*, 11a, n.3).

[5] Although the district court enjoined enforcement of the statute only as to appellees, its decision places the Postal Service in substantial uncertainty regarding the lawful application of the statute to others. Unless the decision below is overturned, it can be expected that

1. Pursuant to Article I, Section 8, Clause 7 of the Constitution, granting Congress the power "[t]o establish Post Offices and post Roads," and Article I, Section 8, Clause 18, the "necessary and proper" clause, Congress has broad authority to regulate virtually all aspects of mail delivery. See *Ex parte Jackson*, 96 U.S. 727, 732 (1877); *United States Postal Service* v. *Brennan*, 574 F.2d 712, 714 (2d Cir. 1978), stay denied, 439 U.S. 1345 (1978) (Marshall, J.), cert. denied, 439 U.S. 1115 (1979); *United States* v. *Black*, 569 F.2d 1111 (10th Cir.), cert. denied, 435 U.S. 944 (1978); *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973).[6] That power extends to reasonable regulation of third party access to letter boxes that are required of patrons wishing customer delivery services. See *Domestic Mail Manual* §§ 155.41(a), 156.311, incorporated by reference in 39 C.F.R. 111.1.[7] These letter boxes, which must be "established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter" in order to fall within the protections of Section 1725, are an integral part of the government's constitutional duty to provide for the carriage of the mails.

Courts should defer to the congressional determination of the wisdom of legislation enacted pursuant to the Postal Power unless the statute contravenes some limitation

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numerous groups, including political and commercial as well as civic organizations, will seek to enjoin enforcement of Section 1725 on the ground that it abridges their First Amendment rights. A nationwide case-by-case adjudication of these questions, without authoritative guidance from this Court, would waste judicial resources and be unnecessarily expensive and burdensome for the Postal Service.

[6] This Court, for example, has repeatedly upheld Congress' power to designate articles that may not be sent through the mails. See *Smith* v. *United States*, 431 U.S. 291 (1977); *Public Clearing House* v. *Coyne*, 194 U.S. 497, 506-508 (1904); *In re Rapier*, 143 U.S. 110 (1892).

[7] Postal regulations requiring that letter boxes or other receptacles be used exclusively for the mail, and prohibiting the installation on rural mail boxes of metal hooks for the delivery of an advertising journal that contained local news, have been upheld against a challenge based, *inter alia*, on the First Amendment. *Rockville Reminder, Inc.* v. *United States Postal Service*, *supra*.

found elsewhere in the Constitution. *Buckley* v. *Valeo*, 424 U.S. 1, 91 (1976). By engaging in its own *ad hoc* balancing of the interests supporting the statute against the statute's impact on the operations of appellees, the district court overlooked this Court's statement that " 'great weight [must be given] to the decisions of Congress' even though the legislation implicate[s] fundamental constitutional rights guaranteed by the First Amendment." *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 21, quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). It was accordingly improper for the district court to focus on what it believed to be the wisest balancing of the competing interests affected by the legislation. When the proper test is applied, we submit that any incidental impact of Section 1725 on appellees' ability to communicate with their constituents is minimal and does not amount to a violation of the First Amendment.

2. Because of the nature of its business, virtually all aspects of the Postal Service's operation have some impact on the ability of people to communicate effectively. But the enforcement of the restriction at issue here, like the refusal to allow an organization to take advantage of cheap bulk mail rates in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, (1977), does not "fundamentally implicate *free speech* values" (*id.* at 130-131; emphasis in original). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). No such restriction is involved here. There is nothing to suggest that the statute on its face, or as applied, restricts any communication because of its content. Not only are appellees free to communicate with their constituents through means other than placing notices in letter boxes without paying postage, but if they pay the requisite postage the Postal Service will deliver the notices and will place them in the appropriate letter box. Cf. *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 93-94 (1977).

Appellee's argument that the cost of postage is so "burdensome" that the requirements of Section 1725 violate the First Amendment is without merit. The guarantee of free speech does not include a constitutional entitlement to the financial resources to make maximum use of that guarantee. Cf. *Harris* v. *McRae*, No. 79-1268 (June 30, 1980); *Maher* v. *Roe*, 432 U.S. 464, 474-475 n.8 (1977). In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra*, 433 U.S. at 130-131, for example, this Court held that a prison ban on the acceptance of bulk mailings by a prisoners' union to inmates did not infringe on the union's First Amendment rights, despite the consequent deprivation of the advantages of "cheaper rates and convenience." Likewise, free speech values are not implicated here merely because appellees are required either to pay the ordinary costs of using part of the postal system, *i.e.*, a receptacle set aside for the exclusive use of the Postal Service's customer mail delivery system (see *Rockville Reminder, Inc.* v. *United States Postal Service*, *supra*, 480 F.2d at 8), or to incur the inconvenience of delivering their messages to constituents through some means outside the postal system. Cf. *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966).

In any event, to the extent that the enforcement of the statute imposes an incidental restriction on free speech, it should be upheld as a reasonable, content-neutral regulation of the *place* of communication. As this Court recently reaffirmed, "[a] restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable." *Consolidated Edison* v. *Public Service Commission*, No. 79-134 (June 20, 1980), slip op. 5. See also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965), and cases there cited.

The restriction imposed by Section 1725 is clearly a reasonable means of furthering the legitimate interests of the Postal Service. First, as the legislative history plainly re-

flects, the statute protects against dilution of mail revenues. See, *e.g.*, *National Association of Letter Carriers* v. *Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *United States Postal Service* v. *Brennan*, *supra*. In addition, by limiting the number of people who may have access to letter boxes, the statute protects the security of the mails from theft or other tampering, and by ensuring that letter boxes are not cluttered by unmailed matter it promotes the efficient delivery of the mails. Finally, the statute is a substantial protection of the privacy interests of mail customers.[8] The privacy of the mail has a long and honored tradition in this country. See, *e.g.*, *Ex parte Jackson*, *supra*, 96 U.S. at 733. That tradition reinforces the normal expectation of residents that no one other than members of their household and postal employees will look at their mail or pry into their mail box. A letter box is not a public forum such as a street or a park, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), or even a private area such as a doorway where visitors are expected. *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943). It has only one use—to hold the householder's incoming or outgoing mail until it is picked up. The postal customer is entitled to receive and send his mail without having uninvited third parties peruse the envelopes.

Nor does appellees' alleged need to use the letter boxes justify this invasion of privacy or the interference with the governmental interests protected by the statute. This is not a situation where governmental action "has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully

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[8]The district court erred in concluding that the Postal Service could not raise these privacy interests in support of Section 1725. Such notions of standing have no place in assessing the constitutionality of a federal statute. Congress has undoubted authority to enact legislation protecting the privacy of users of the mails. *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970). See *Carey* v. *Brown*, No. 79-703 (June 20, 1980), slip op. 15; cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302-304 (1974).

communicate." *United States* v. *O'Brien*, 391 U.S. 367, 388–389 (1968) (Harlan, J., concurring). Rather, the statute "leave[s] open ample alternative channels for communication of information." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 771. As shown by the survey introduced in the district court (see note 3, *supra*), civic associations such as appellees can communicate effectively with their constituents by using a number of feasible alternatives. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra*, 433 U.S. at 130–131. Compare, *e.g.*, *Lovell* v. *City of Griffin*, 303 U.S. 444, 451 (1938).

In sum, Section 1725 does not infringe on appellees' First Amendment rights. The statute furthers important interests of the Postal Service and the recipients of mail matter, and it has only the most incidental impact on freedom of expression. Hence, Congress "has exercised its power to regulate [postal matters] in such a manner as not unduly to intrude upon the rights of free speech." *Village of Schaumberg* v. *Citizens for a Better Environment*, *supra*, 444 U.S. at 633.

CONCLUSION

Probable jurisdiction should be noted.[9]

Respectfully submitted.

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[9]The Court may wish to consider summary reversal.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 483 (WCC)

THE COUNCIL OF GREENBURGH CIVIL ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT

OPINION AND ORDER

CONNER, D. J.:

This action is brought by an umbrella organization for numerous Westchester County civic associations, The Council of Greenburgh Civic Associations, and one of the Council's member associations, the Saw Mill Valley Civic Association. Plaintiffs seek, on First Amendment grounds, declaratory and injunctive relief from the Postal Service's threatened enforcement of 18 U.S.C. § 1725[1] with regard to the activities of plaintiffs and other Council members in depositing unstamped flyers and notices in mailboxes of private homes located in the Town of Greenburgh. Plaintiffs further seek similar relief on behalf of "others similarly situated."

The case is before this Court on remand from a decision of the Second Circuit Court of Appeals directing this

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[1] That section reads as follows:

"§ 1725. Postage unpaid on deposited mail matter

Whoever knowingly and willfully deposits any mailable matter such as statement of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300."

Court to give the parties an opportunity to submit proof as to (1) the nature and extent of the handicap to plaintiffs' ability to communicate with their constituents if the statute is enforced (thus restricting plaintiffs to use of the mails or to alternative means of house-to-house distribution) and (2) the opposing interest of the Postal Service in enforcing the statute as to these plaintiffs, particularly the Postal Service's interest in preventing mailbox overcrowding, promoting the security of the mails, and protecting mail revenues. *Council of Greenburgh Civic Associations* v. *United States Postal Service*, 586 F.2d 935 (2d Cir. 1978). This Court heard testimony on these issues on June 28 and July 5 and 6, 1979.

This opinion and order incorporates the Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

LEGAL STANDARD

Both the majority opinion for the Second Circuit and Judge Kaufman in his concurring opinion suggested that the named plaintiffs[2] would be entitled to relief if the testimony at trial indicated that, on balance, the curtailment of plaintiffs' interest in free expression resulting from enforcement of the statute substantially outweighed the government's interest in the effective delivery and the protection of the mails. 586 F.2d at 936–37. Judge Kaufman further suggested, see 586 F.2d at 937, that plaintiffs might be entitled to relief on a showing of a less substantial curtailment of their interest in free expression if the testimony at trial indicated that the deposit of circulars in mailboxes constituted such an established means of com-

[2] The Circuit Court did not consider plaintiffs' contention that the Postal Service should also be enjoined from prosecuting under the statute other, similar, noncommercial local civic associations since this is not a class action, and, in pre-trial conferences, plaintiffs indicated that they sought relief only for themselves and their members. See this Court's opinion below, No. 77 Civ. 483 (S.D.N.Y., filed March 29, 1978) (Conner, J.), granting defendant's motion to dismiss under Rule 12(b), F.R.Civ.P.

munication that the mailboxes could be considered a public forum within the meaning of cases such as *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); and *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), and if the evidence further showed that the statute as applied did not constitute a reasonable restriction of time, place and manner upon the use of that forum, see *Grayned*, *supra*, 408 U.S. at 116–17.

TESTIMONY AT TRIAL

A. BURDEN ON PLAINTIFFS' ABILITY TO COMMUNICATE

1. Burden flowing from use of the mails

The evidence at trial establishes that use of the mails is financially burdensome to plaintiffs and constitutes a significant impediment to plaintiffs' ability to communicate quickly with their constituents. Numerous witnesses testified to the small or nonexistent cash reserves of the neighborhood civic groups represented by the umbrella organization of the Council of Greenburgh Civic Associations, as well as to the small cash reserves of the Council itself. Trial transcript ("Tr.") at 23, 94–95, 150–51, 208–09, 253. Plaintiffs' witnesses also testified that the majority of Greenburgh neighborhood associations, because of their size or tax status, were not eligible for bulk

mail or charitable organization mail rates; that the majority of such groups could not afford even those reduced rates on a regular basis; and that the updating of the address lists necessary for a mailing and the addressing of envelopes or folded flyers constituted a significant administrative burden on a small volunteer civic group. See, *e.g.*, Tr. at 22–23, 82, 108. Defendants did not contradict this testimony, except to indicate that certain larger civic associations might qualify for bulk mail rates if they could pay the initial fee.

Plaintiffs' witnesses further testified that much of the business of local civic associations concerns activities of local government bodies—town and village boards, school boards, and the like; and that the agendas for such meetings are often available only a short time before the meetings, or that matters come up without being placed on a prepared agenda, so that notice must often be given to constituents within a very short time. Tr. at 22, 152, 214–15, 340. The mail, these witnesses stated, has not, in their experience as civic organization members, been delivered with the speed required to notify constituents of such urgent matters. Tr. at 23, 168–70, 197–99, 624. Defendant's witnesses did not refute plaintiffs' evidence as to the speed of mail service in the Town of Greenburgh: while defendant did introduce evidence showing that internal Post Office guidelines require delivery of bulk mail within two days after it arrives at the receiving post office, Tr. at 366 and defendant's Exhibit G, defendant's witnesses admitted that these time standards are frequently not met, Tr. at 422–23, that their compliance figures for White Plains bulk mail rely on a sample of less than 5% of such mail, Tr. at 465–66, and that the standards are especially difficult to achieve in a multi-Post Office region such as the Town of Greenburgh, Tr. at 467.

2. Effectiveness of Alternative Methods of Delivery

The evidence further establishes that none of the alternative means of flyer delivery or other communication suggested by defendant or by the Second Circuit—hanging

material on door knobs, placing flyers under doors, using newspaper or other non-postal boxes affixed to houses or mailbox posts, telephone communication, hand-to-hand delivery, leaving flyers wrapped in a plastic sandwich bag on the doorstep—is nearly as effective as placing civic association flyers in approved mailboxes; so that restriction of plaintiffs' delivery methods to such alternatives also constitutes a serious burden on plaintiffs' ability to communicate with their constituents.

Plaintiffs' witnesses testified at length as to the impracticality of the alternative delivery methods suggested. If civic associations attempt to deliver notices by leaving them outside, unprotected (*i.e.*, by inserting them part way into a door, or under a doormat, or taped onto a door), they testified that the materials are often lost, blown away or damaged or hidden by rain or snow before the occupant has an opportunity to retrieve and read them. Tr. at 41, 106, 150–52, 238, 258–59. They further testified that it is usually impossible for a civic association member to deliver flyers by slipping them *all* the way under the door of a house in these suburban areas because the vast majority of homes have weatherstripping under the outside door or screen door. Tr. at 85. If special measures are employed to protect the flyers from the weather—*i.e.*, use of special plastic bags which fit over a doorknob, or placing the flyers in conventional plastic bags—these measures take time and are relatively expensive for a small volunteer organization, Tr. at 35, 622; moreover, the plastic-wrapped notices may also be blown away or lost, and the special doorknob bags may not be suitable for all the different types of door handles found on houses in the area. Tr. at 35, 87, 150–52. Defendant's own survey, which measured two alternative delivery methods against in-mailbox delivery, demonstrated that nonmailbox delivery methods are markedly less successful in reaching occupants than in mailbox delivery. Tr. at 535; Defendant's Exhibit D–1.

In addition, plaintiffs' witnesses testified that nonmailbox flyer delivery often caused resentment among their constituents because leaving such material outside in plain

sight could be an advertisement to burglars that the house was empty, Tr. at 38, 84–85, 150–52, 258, and because of the litter problem created by flyers blown about the neighborhood, Tr. at 35.

Plaintiffs' witnesses also testified that alternative communication methods which depended on reaching the occupant personally—personal delivery of notices, or phone calls to the occupant's home—had proved to be far less effective than mailbox delivery in reaching constituents, since at any given time the person called or visited might not be home, and since volunteer callers or visitors could not or would not take the time to make several visits or calls to each constituent, while a notice in a constituent's mailbox would reach him at whatever time he came home. Tr. at 42 (hand delivery); 111, 343.

Finally, plaintiffs introduced testimony that only a limited number of residents have newspaper or other non-mailbox receptacles attached to their mailbox posts or to their houses, impeding the effective use of such boxes for distributing civic association materials. Tr. at 620.

3. Effect of Enforcement of § 1725 on Civic Associations

The burdensome nature of the restriction on mailbox delivery on the activities of these civic associations is further established by testimony that, subsequent to the time certain Greenburgh area civic associations received enforcement letters from the Postal Service and began to comply with the requirements of the statute, the effectiveness of those organizations as measured by, among other things, attendance at association meetings and ability to produce attendance at local government functions, has been reduced. Plaintiffs' witnesses further testified that, as a result of their restricted ability to communicate with prospective and current members, the membership of certain Greenburgh civic associations has dropped to the point at which the associations are no longer viable entities. Tr. at 192–93; 344.

B. NEED FOR ENFORCEMENT OF THE STATUTE: THE POSTAL SERVICE'S POSITION

1. Mailbox overcrowding

The evidence does not demonstrate that the crowding of mailboxes due to deposit of civic association notices constitutes an impediment to delivery of the mails. Several civic organization representatives testified on behalf of plaintiffs that they had had considerable experience with mailbox delivery and that they had never observed serious mailbox clutter or overflow when they deposited their organization's flyers. Tr. at 31, 116, 150, 341. The defendant did not introduce evidence on this point and does not appear to be pressing a claim of overcrowding.

2. Security of the mails

Four postal inspectors testified that enforcement of 18 U.S.C. § 1725 was marginally useful in the enforcement of the statutes relating to "internal" mail theft (*i.e.*, theft by Post Office employees) and "external" mail theft (by others), the Private Express Statutes, and the mail fraud and related antifraud statutes. Inspector Edmund H. Mullins testified that if the government could not enforce § 1725, it would interfere with investigations of internal mail theft, since postal patrons might become accustomed to seeing unauthorized persons approaching and opening mailboxes and would not report such incidents as unusual. Inspector Mullins further testified, however, that internal mail theft investigations presently relied on the suspicion generated by persons standing at a mailbox only where the mailbox was placed by itself at some distance from the postal patron's house, Tr. at 139–40, and that enforcement of § 1725 does not eliminate internal mail thefts, Tr. at 143–44.

Inspector Alvin F. Lambden testified at § 1725 aided the enforcement of the Private Express Statutes contained in Title 39, U.S.C. and 18 U.S.C. §§ 1694–96 and of the anti-fraud statutes of 18 U.S.C. §§ 1341–42 and 39 U.S.C. §§ 3005–07: when unstamped matter deposited in mailboxes was brought back to the local Post Office by the mail

carrier, this could lead to prosecution under one of the two sets of statutes. Tr. at 270–71. Inspector Lambden then testified, however, that although he has investigated hundreds of cases under the mail fraud statutes, he has not investigated any fraud cases stemming from or related to a § 1725 investigation, Tr. at 305; and that he has only investigated ten § 1725 cases, all related to commercial users, Tr. at 306–07. Inspector Curtis L. Woodard also testified that § 1725 was an aid to enforcement of the mail fraud statutes, Tr. at 557–69, but admitted that the $300 fine contained in § 1725 for unstamped deposit of material in mailboxes would not constitute a substantial deterrent to a scheme to defraud formulated to avoid the jurisdictional reach of the mail fraud statutes by relying solely on unstamped deposit in mailboxes, Tr. at 561–62.

Inspector Allan P. Bzik testified that the enforcement of § 1725 was important to the success of surveillance operations used in investigations of external mail theft under 18 U.S.C. § 1708, Tr. at 590–91, since § 1725 limited the number of people who could approach a mailbox without arousing suspicion. He further testified, however, that only ten per cent of the arrests under the external theft statute resulted from such surveillance operations, Tr. at 595, and that failure to enforce § 1725 would not be "totally disastrous" to enforcement of the external theft statute, Tr. at 599.

3. Protection of mail revenues

Defendants presented testimony by John M. Nolan, General Manager of the Delivery Division of the Post Office's Northeast Region, on the additional cost to the Postal Service of limiting enforcement of § 1725 to commercial users. Mr. Nolan testified that the government would incur additional expense as a result of the additional time a mail carrier would have to spend in reviewing non-mail matter in the mailbox if certain types of non-mail matter (*i.e.*, civic association material) could be left in the mailbox while other types (*i.e.*, commercial matter) could not. Mr. Nolan estimated that the additional cost to the

government of such a review would be approximately $160,000 on a daily basis nationwide. Tr. at 386–91, 395–96. Mr. Nolan also testified, however, that mail carriers do currently perform certain services requiring examination of material in the mailbox, including processing stamp purchases on behalf of rural postal patrons and review of material in a box for possible violations of the private express statutes. Tr. at 382–83.

Mr. Nolan further testified that § 1725 was currently enforced in a manner which was designed to recoup revenues directly by requiring those persons out of compliance with the statute to pay for the unstamped material found in mailboxes. Tr. at 407, 412. On the related point of future revenues, however, plaintiffs introduced the testimony of civic association members that the response of the majority of civic associations to threatened enforcement of § 1725 was to discontinue delivery of flyers altogether, rather than to switch to mail distribution.

DISCUSSION

The Court concludes that plaintiffs have shown that the burden on their ability to communicate ideas, positions on local issues, and civic information to their constituents flowing from enforcement of § 1725 is substantial. The Court further concludes that the cost to free expression of imposing this burden on plaintiffs outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and protection of the mails.

As the Second Circuit has emphasized, the activities of plaintiffs here—informing community residents about the activities of their local government officials, identifying concerns of local residents to be brought to the attention of those officials, and encouraging residents to participate directly in local government decision-making by attending school board, town, water district and other meetings—fall squarely within the range of activities which the First Amendment was expressly designed to protect. See, *e.g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S.

829, 838 (1978), citing *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966): "'Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs'"; *Council of Greenburgh Civic Associations* v. *United States Postal Service*, *supra*, 586 F.2d at 938 (Kaufman, J., concurring) (discussion of "the fundamental right of house-to-house distribution"). Plaintiffs have shown that these activities have been curtailed to a significant degree by observance of the statutory prohibition, that, in the areas in which they operate, non-mailbox methods of delivery are much less satisfactory than mailbox delivery, and that use of the mails to deliver their messages is both financially prohibitive for most civic associations and slow to a degree which significantly diminishes their effectiveness in alerting their constituents to local government meetings and other impending local government activity.

The defendant, on the other hand, has not shown that failure to enforce the statute as to these groups would result in a substantial loss of revenue, or a significant reduction in the government's ability to protect the mails by investigating and prosecuting mail theft, mail fraud, or unauthorized private mail delivery service. The testimony does indicate that the Postal Service receives certain income from enforcement of § 1725, but the defendant has not demonstrated that the percentage of income which comes from enforcement of the statute against civic groups is large when compared with the revenue generated by enforcement against commercial entities, or when viewed in the context of the entire Postal Service budget. In addition, it appears that any projected future postal revenues resulting from enforcement of the statute against civic groups must be discounted by the likelihood that certain civic associations will greatly curtail their activities or even go out of existence altogether, as a result of enforcement of the statute. Moreover, the Court is not convinced that the Postal Service will be forced to expend substantial additional monies for additional time spent by mail

carriers in enforcing § 1725 in the manner plaintiffs suggest. The conclusion drawn from defendant's time-motion study is dubious because defendant's witnesses further testified that mail carriers currently inspect material found in mailboxes for compliance with both § 1725 and the Private Express Statutes, and the defendant has not specified the incremental cost of a determination by the mail carrier during such an inspection that nonstamped material found in a mailbox is civic rather than commercial in nature. Since both commercial and non-commercial materials are usually delivered to every house within a selected area, the postal carrier will ordinarily have to examine a particular piece carefully only once, and will be able to recognize the same piece instantly when he sees it in other mailboxes on his route. Finally, enforcement of § 1725 against civic associations does not appear so necessary or contributive to enforcement of the anti-theft, anti-fraud or Private Express statutes that this interest outweighs the plaintiffs' substantial interest in expedient and economical communication with their constituents.[3]

The Postal Service will accordingly be enjoined from enforcing 18 U.S.C. § 1725 as to plaintiffs, and the Court

[3] Defendant further argues in its submissions that the construction of the statute which plaintiffs' advocate will infringe upon the privacy of homeowners, and that the Court should therefore also weigh this infringement in determining whether the balance tips in favor of plaintiffs. It appears to the Court, however, that while the Postal Service is charged with protecting the privacy of the mail with respect to the activities of their carriers, Tr. at 378, it does not follow that the Postal Service may raise here the privacy interest of homeowners with respect to third parties approaching the homeowners' houses or mailbox posts; and, further, that insofar as those homeowner interests are at issue here, homeowners may continue to exclude unwanted visitors through posting of "no trespassing" signs, enforcement of local trespass laws and similar expedients, so that this factor does not tip the balance in favor of enforcement of § 1725 as to these civic associations.

will enter judgment declaring the statute unconstitutional as applied[4] to plaintiffs.[5]

With respect to the appplication of the statute to "other groups similarly situated," the Court holds that plaintiff Council has standing to raise these claims on behalf of its member organizations, see *NAACP* v. *Button*, 371 U.S. 415, 428, (1963), and finds that plaintiffs have shown that Council's member groups are similarly substantially burdened by enforcement of this statute. The Postal Service will accordingly be enjoined from enforcing 18 U.S.C. § 1725 against plaintiff Council's constituent civic associations as well as against the named plaintiffs, and the Court will enter judgment declaring enforcement of the statute as to such groups to be in violation of the First Amendment.

Plaintiffs shall submit a judgment on fifteen days' notice within ten days of the date of this Opinion and Order.

SO ORDERED.

/s/ WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
April 24, 1980

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[4] The Court does not find, however, that plaintiffs have established that § 1725 is so significantly aimed at neighborhood civic groups or so unsusceptible to a narrowing construction as to be substantially overbroad within the meaning of Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also discussion in Council of Greenburgh v. U.S. Postal Service, *supra*, 583 F.2d at 938 (Kaufman, J. concurring) as to valid sweep of this statute.

[5] In light of its conclusion that the evidence at trial shows that, even under a more stringent balancing test, plaintiffs are entitled to relief, the Court need not reach the issue of whether, under the alternative theory suggested by Judge Kaufman, plaintiffs have established that mailbox usage is so established as a means of civic group communication as to constitute a public forum whose use may be restricted only as to time, place and manner, see *Grayned*, *supra*.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 236
Docket 78–6105

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION,
PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES POSTAL SERVICE,
DEFENDANT-APPELLEE

[Decided Oct. 30, 1978]

Before KAUFMAN, *Chief Judge*, SMITH and MESKILL, *Circuit Judges*.

J. JOSEPH SMITH, *Circuit Judge:*

Two "non-partisan civic organizations," threatened with prosecution under 18 U.S.C. § 1725[1] for depositing unstamped notices and pamphlets in approved letter boxes of private homes, sought declaratory and injunctive relief on first amendment grounds in the United States District Court for the Southern District of New York, and moved with supporting affidavits for summary judgment. The court, William C. Conner, *Judge*, dismissed the complaint on a cross-motion under Fed.R.Civ.P. 12(b). We find error in the dismissal at this stage of the case, reverse the order of dismissal and remand for further proceedings.

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[1] 18 U.S.C. § 1725 provides that:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.00.

The motion to dismiss under Rule 12(b) was based on a claimed failure to "state a cause of action," *i.e.*, a failure to state a claim on which relief can be granted. We think, however, that enough is alleged in the complaint to raise the issue of infringement of freedom of communication.

Plaintiffs have alleged that the only practicable method of delivery of their messages to their constituents is hand delivery to the privately-owned mail receptacles of the constituents, and that the enforcement of § 1725 against them deprive them of constitutional rights—including the rights of free speech and free press. The costs and time delays of using the regular mails are claimed to be in practice insurmountable barriers to effective communication by ordinary mail by these plaintiffs. We think these allegations sufficient to survive a Rule 12(b) motion to dismiss.

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cruz* v. *Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972), *citing Conley* v. *Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–102, 2 L.Ed.2d 80 (1957); see also, *Build of Buffalo, Inc.* v. *Sedita*, 441 F.2d 284 (2d Cir. 1971).

The allegations, though general, are sufficient under this standard. If they were thought deficient in any way, permission to amend should have been granted. The parties are entitled to an opportunity to submit proof as to the extent of the handicap[2] to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other.[3] This is a sensitive first amendment

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[2] Whether the cost and delay occasioned by use of the mails are serious burdens, and whether the burdens can be avoided by alternate means, such as the use of door knobs, door handles, under door delivery, etc. Compare, *Rockville Remainder, Inc.* v. *United States Postal Service*, 480 F.2d 4, 7–8 (2d Cir. 1973).

[3] The problems caused by mail box clutter, security considerations, protection of mail revenues, etc.

area. Careful balancing of the need for the statute against the statute's constriction of first amendment rights is called for. See *Martin* v. *City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Schneider* v. *State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). Full development of the facts is essential for the court to strike this balance.

We express no opinion, on this record, on the merits of the claim.

Reversed and remanded.

IRVING R. KAUFMAN, *Chief Judge* (concurring):

I concur in my Brother Smith's clear and succinct opinion. I add these comments only to elaborate on the considerations underlying our conclusion that the two plaintiff civic organizations have stated a constitutionally cognizable claim.

The free expression interest of these associations is not shrouded on obscurity. It is illumined clearly by some of the classic writings on the First Amendment. Freedom of press "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Lovell* v. *Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). And probably the most effective way of ensuring that such literature reaches its intended audience is house-to-house distribution. *Schneider* v. *State*, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155 (1939). Indeed, the Supreme Court has declared that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." *Martin* v. *City of Struthers*, 319 U.S. 141, 146, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943). Moreover, the individual householder's right to receive information cannot be ignored. *Id.* at 143, 63 S.Ct. at 865. In sum, "Freedom to distribute information to every citizen whenever he desires to receive it is . . . clearly vital to the preservation of a free society. . . ." *Id.* at 146, 63 S.Ct. at 865.

The two civic associations claim that the only way they can effectively exercise this precious right is by direct deposit of their circulars in the letterboxes of community residents. Thus, the associations are drawn into conflict with the Postal Service, which argues that, unless the leaflets are accompanied by proper postage, this practice violates 18 U.S.C. § 1725. We cannot affirm Judge Conner's order of dismissal unless we hold as a matter of law that, even if the associations prove all their allegations, they have no right to relief. This we have declined to do.

I do not question the power of Congress to establish a monopoly of postal service, *United States Postal Service* v. *Brennan*, 574 F.2d 712 (2d Cir. 1978). And it is clear that the exercise of that power includes the authority to provide reasonable regulations for unobstructed access to delivery boxes, *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973). But the postal power, no more than any others delegated to Congress, may not be exercised in a manner that violates the fundamental freedoms guaranteed by the First Amendment. *Blount* v. *Rizzi*, 400 U.S. 410, 416, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971).

It is unnecessary to decide now whether deposit of circulars in letterboxes is so established as a means of communication[1] that it may be restricted only by the narrow category of "time, place, and manner" regulations.[2] At the very least, the Postal Service must show that its asserted interest is substantial enough to outweigh the burden on

[1] Affidavits submitted for the associations asserted that this was a common form of communication welcomed by community residents. The legislative history also indicates that it has been a prevalent practice for several decades, *see* 75 *Cong. Rec.* 5575–77 (1932); *see also United States* v. *Brown*, 551 F.2d 236, 240 (8th Cir. 1977) ("non-mail items such as newspapers and circulars are often placed in private mailboxes.")

[2] In assessing the constitutionality of such measures, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972).

free expression. *E.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 509, 66 S.Ct. 276, 90 L.Ed. 265 (1946). And in scrutinizing that balance, we must keep our thumb on the First Amendment side of the scales, to guarantee that free expression, the keystone of our constitutional structure, will not be shaken. Kalven, *The Concept of the Public Forum*, 1965 Sup.Ct.Rev. 1, 28.

Given the fundamental right of house-to-house distribution, I believe a crucial consideration is whether the associations have any acceptable alternative to direct deposit in letterboxes. They allege that they do not, and at this stage of the proceedings we cannot be certain that their assertion is unfounded. The affidavit submitted by Fritjof Schroder,[3] an experienced community leader active in both associations, claimed that limited access and vagaries of climate together render alternative means of delivery, such as placement of the material behind screen doors or on driveways, inadequate.

Indeed, it appears that Congress itself, when it enacted the predecessor to § 1725, believed that it was severely restricting the possibility of house-to-house delivery of materials covered by the statute. One of the primary purposes of Congress, the legislative history cited by the Postal Service reveals, was to prevent the loss of postal revenue caused by business concerns that were delivering their commercial matter directly to residents' letterboxes. It is unlikely that Congress believed these companies, barred free access to the receptacles, would continue house-to-house delivery to escape postal charges.[4]

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[3] The plaintiff associations submitted affidavits in support of their motion for summary judgment under Fed.R.Civ.P. 56. The Postal Service, which moved for dismissal under Rule 12(b)(6), did not submit affidavits. Judge Conner did not exercise the power to treat the motion as one for summary judgment but grounded his dismissal on Rule 12(b)(6).

[4] The plaintiffs may show on remand that the practice has, indeed, been abandoned. It is interesting to note, moreover, that the plaintiff Saw Mill Valley Civic Association, after being warned by the Postal Service that it was violating § 1725, chose to circulate its next message by mail, although it could not afford to reach the entire community by

Examining the other side of the scales, none of the interests claimed by the Postal Service is so self-evident that mere assertion of it precludes the associations' claim. The Service cites first the need to keep letterboxes both uncluttered and secure. But without searching inquiry we cannot conclude that these interests are so substantial and so imperiled by the practice in question that they outweigh a free expression claim. Moreover, it is crucial to emphasize that § 1725 does not prohibit deposit of mailable matter in letterboxes, but only requires that all matter so deposited bear proper postage. It is not immediately apparent why deposit of a circular, simply because a postage stamp was affixed, would be less cluttering or endangering to a letterbox.

We are brought, then, to the Service's contention that the prohibition of § 1725 is necessary to protect the postal revenue. Insofar as the statute is intended to prevent commercial concerns from conducting their business via an alternative to postal delivery,[5] this is unquestionably a

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this method, rather than utilizing any alternative means of house-to-house distribution. This case, therefore, appears quite different from *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973), where a newspaper company rejected for its own convenience "other alternatives," besides the two-inch hooks it wanted to fix on mailboxes, for delivering its journal. *Id.* at 7.

[5] We need not decide now whether the statute was intended to cover only commercial matter. The question does not appear elementary. It is true that in 1932 the sponsor of a bill worded in terms similar to those of § 1725 opined that it would cover all mailable matter, but he also expressed the belief that social messages "would not be interfered with" and explained that the object of the bill was to prevent the situation "where some large corporation withdraws a volume of mail from the Post Office Department and sets up a service of its own." 75 *Cong. Rec.* 5577 (1932).

In any event, Congress did not enact the 1932 bill. Regulation to similar effect, however, was adopted in 1934 by the Postmaster General. Although a press release listed "political handouts" among the types of matter cluttering mailboxes, the official explanation given by the Third Assistant Postmaster General expressed concern only with the practice of business companies. 55 *Postal Bulletin*, Jan. 5, 1934. And when the predecessor of § 1725 passed soon afterwards, the committee report in the House stated concern only over the practice of

valid interest. Here, however, we are concerned not with bills from public utilities but with civic and political statements of the type that lie at the very core of the First Amendment's concern.[6]

If § 1725 is an attempt to force citizens wishing to make civic or political statements to use the mails rather than exercise their right of house-to-house distribution, it would appear at first blush to be invalid. The Government may not bar access to one forum of expression because it prefers another, *see Thornhill* v. *Alabama*, 310 U.S. 88, 106, 60 S.Ct. 736, 84 L.Ed. 1093 (1949). This rule seems particularly pertinent when citizens are asked to surrender a fast and inexpensive means of communication as a method of compelling them to patronize a slower and more costly governmental monopoly. "Freedom of speech [and] freedom of the press . . . are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

When we enter the realm of the First Amendment, the rule of judicial deference towards legislative action is modified. The judicial action must ensure that the channels of communication are kept open to the widest extent possible, consistent with the public order and safety.

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private delivery adopted by some "[b]usiness concerns, particularly utility companies." H.Rep.No. 709, 73d Cong., 2d Ses[illegible].

A final consideration, especially relevant because the Postal Service insists in its brief that the words of the statute are not in themselves perfectly clear, is the long-established rule that, where possible, a statute should be construed to avoid even a serious question of constitutionality. *E.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 75 L.Ed. 598 (1932).

[6] *See, e.g.*, *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 90 (2d Cir. 1968). The Supreme Court has recognized that expression does not lose its constitutional protection because it occurs in a commercial context, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). Certainly, the Court has never had occasion to suggest that statements of a political and civil nature do not stand on a higher constitutional ground than account statements or other commercial communications. *See id.* at 771-72, 96 S.Ct. 1830, n.24.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 483 (WCC)

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS,

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT.

[Filed May 20, 1980]

FINAL JUDGMENT

This action having come on for trial before the Court, Honorable William C. Conner, District Judge presiding and the issues having been duly tried and a decision having been duly rendered, it is

ORDERED AND ADJUDGED, that 18 U.S.C. § 1725 is unconstitutional as applied to Beaver Hill Civic Association, Birchwood Civic Association, Broadview Civic Association, Centennial Manor Civic Association, Central Park Ave. Civic Assoc., The Colony Civic Assoc., Cotswold Assoc., Country Club Ridge Civ. Assoc., Dalewood Civic Assoc., Deer Hill Civic Assoc., Greenville Community Council, Donald Park Civic Assoc., Downing Hill Civic Assoc., Dunnings Drive Assoc., East Irvington Assoc., Edgemont Assoc., Elmsford Civic League, Fort Hill Assoc., Fulton Park Assoc., Glenville Taxpayers Assoc., Greenridge Civic Assoc., Hartsdale Acres Civic Assoc., Hartsdale Fels Civic Assoc., Hartsdale Hills Civic Assoc., Hartsdale 4 Corners Assoc., Hartsdale Lawns & Manor C.A., Hartsdale Park Civic Assoc., Hawthorne Way Civic Assoc., High Point Civic Assoc., Hillcrest Park-Ardsley C.A., Hillside-Wyndover Assoc., Hilltop Farms Civic Assoc., Inwood Hill Civic Assoc., Juniper Hill Civic Assoc., Knollwood Manor Assoc., League of Women

Voters, Longview Assoc., Manor Woods Assoc., Mayfair-Knollwood Civic Assoc., Northern Greenville Assoc., Orchard Hill Civic Assoc., Parkway Gardens Assoc., Parkway Homes Civic Assoc., Pinecrest Civic Assoc., Colonial Ridge Civic Assoc., Pinewood Gardens Tenants' Assoc., Saw Mill Valley Civic Assoc., Secor Woods Civic Assoc., Six Acres Assoc., Southern Greenville Assoc., Sprain Road Civic Assoc., Tarryhill Civic Assoc., Washington Ave. Civic Assoc., Westchester Hills Assoc., Winding Road Farms Assoc., Woodhill Civic Assoc., and it is further*

ORDERED AND ADJUDGED, that the United States Postal Service is enjoined from enforcing 18 U.S.C. § 1725 as to the civic organizations identified above; and it is further

ORDERED AND ADJUDGED, that this judgment is stayed for a period of sixty (60) days from the date of its entry.

Dated: New York, New York
May 19, 1980

/s/ WILLIAM C. CONNER
U.S.D.J.

JUDGMENT ENTERED 5/20/80

/s/ RAYMOND F. BURGHARDT
Clerk

* ORDERED AND ADJUDGED, that the Court will retain jurisdiction over this matter for the sole purpose of amending the list of organizations covered by this judgment, upon the application of plaintiffs, to include any civic association in the Town of Greenburgh, County of Westchester, State of New York, which hereafter becomes a member in good standing of the Council of Greenburgh Civic Associations; and it is further

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 483 (WCC)

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS,

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT.

[Filed June 18, 1980]

NOTICE OF APPEAL

SIR(S):

NOTICE IS HEREBY GIVEN that the defendant United States Postal Service appeals to the Supreme Court of the United States, pursuant to the provisions of Title 28 U.S. Code Sections 1252 and 2101, from the final judgment entered in this action on the 20th day of May, 1980.

Dated: New York, New York
JUNE 18, 1980

Yours, etc.,

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Southern District of New York,
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APPENDIX E

UNITED STATES DISTRICT COURT
S.D. NEW YORK.

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL CIVIC ASSOCIATION, PLAINTIFFS,

v.

THE UNITED STATES POSTAL SERVICE, DEFENDANT

No. 77 Civ. 483 (WCC)

March 29, 1978

MEMORANDUM AND ORDER

CONNER, *District Judge:*

This action, brought by two Westchester County community organizations, challenges the constitutionality of Section 1725 of Title 18, United States Code, and regulations issued thereunder as applied to plaintiffs and "all other similarly situated,"[1] on First Amendment grounds. Section 1725 prohibits deposit of "any mailable matter" in letter boxes without postage. The plaintiff organizations admit that they have violated § 1725 by hand-delivering non-postaged newsletters, brochures and notices regarding various community activities and placing them in the mailboxes of their constituents. In June 1976, plaintiff Saw Mill Civic Association was advised by the Westchester Postmaster that this practice was unlawful, and that fur-

[1] Despite this suggestion that plaintiffs sue in a representative capacity, they have made no motion for class certification; the issues herein are therefore decided only with respect to the named plaintiffs.

ther violations would be prosecuted. In response to an inquiry from plaintiffs' counsel, the Postal Service's Office of General Counsel ruled that the Postmaster had properly applied the statute.

Plaintiffs seek declaratory and injunctive relief, claiming that the enforcement of § 1725 against their distribution of non-commercial literature, which is designed to inform and educate the public, has a "pervasive chilling effect" on the exercise of their First Amendment rights and the rights of those who receive the information they distribute. Plaintiffs maintain that in view of the cost of mailing and delays inherent in the use of the Postal Service, hand delivery of non-postaged material is the only practical and economically feasible means by which they can communicate with the public, and that the continued enforcement of the statute will operate as a prior restraint on speech by effectively preventing distribution of such literature.

Presently before the Court are plaintiffs' motion for summary judgment and defendant's motion to dismiss for failure to state a claim upon which relief may be granted.

The statute in question provides:

> "*Postage unpaid on deposited mail matter*
>
> "Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each offense be fined not more than $300."

18 U.S.C.A. § 1725 (Pocket Part 1977)[2]

---

[2]The applicable regulations are contained in the Postal Service Manual, incorporated by reference in 39 C.F.R. § 111.1. They provide in relevant part:

> "Whoever knowingly and willfully deposits any mailable matter such as statements of account, circulars, sale bills, or other like matter, on which no postage has been paid, in any letterbox es-

Plaintiffs contend that the statute does not apply to non-commercial matter. They argue that terms such as "statements of account," and "sale bills," clearly refer to commercial matter, and the legislative history reveals an exclusive concern with

> "[b]usiness concerns, particularly utility companies, [that] have within the last few years adopted the practice of having their circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails and at the same time is resulting in the stuffing of letter boxes with extraneous matter."
>
> H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934).

There is, however, evidence that the Post Office Department, which proposed the legislation, and its Congressional sponsors, intended the statute to apply to non-

---

tablished, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300." Postal Service Manual Part 146.21

"Except as permitted in 156.58, any mailable matter not bearing postage found in, or upon, or attached to, or supported by, or hung from, the private mail receptacles described in 151.11, is subject to the payment of same postage as would be paid if carried by mail . . .." Postal Service Manual Part 146.221

"Every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, star route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. sections 1702, 1705, 1708 and 1725 . . .." Postal Service Manual Part 151.11.

"Except as provided in 156.58, the receptacles described in 151.11 shall be used exclusively for matter which bears postage. This applies to items or matter placed upon, supported by, attached to, hung from, or inserted into, a mail receptacle. Any mailable matter not bearing postage and found as described above is subject to the same postage as would be paid if it were carried by mail . . .." Postal Service Manual Part 151.12.

mmercial circulars, such as the community notices distributed by plaintiffs. For example, a proposed amendment that would have inserted the word "commercial" into the statute was rejected in the House debates on the bill. In discussing H.R. 9262—a virtually identical predecessor of the bill eventually passed—the following colloquy took place:

> Mr. BLANTON. Mr. Speaker, I ask recognition on the amendment. I am wondering if the gentleman from New York [Mr. Mead], who is chairman of the committee, would be willing to permit an amendment so as to add the word "commercial" before the word "circular," so that it would apply only to commercial circulars. There are some circulars that it is to the interest of the patrons of the Post Office to receive, which are matters of interest in a local community. For instance, there are thousands of communities where notices out in the country to the effect that a church sociable is going to be held or that there is to be singing on Sunday afternoon are put in the mail boxes. This ought not to apply to things of that kind, and it ought to be limited to commercial circulars.
>
> Mr. MEAD. If the gentleman will yield for a moment, permit me to say it is now contrary to law to deposit such circulars as the gentleman has in mind in letter boxes on a rural route.
>
> Mr. BLANTON. That is exactly what I am complaining about, and I am hoping the gentleman from New York in his great experience and wisdom would see fit to stop it from being a violation of the law, because it is to the interest of all the owners of these boxes to receive these little community notices. Of course it is done in spite of the law, but it ought not to be a violation. They ought to have the right to put a little community notice in the box, and if the gentleman would limit this to commercial circulars he would carry out the purpose of the committee and the purpose of the Post Office Department, and still give these people the right to use their mail boxes for little notices that benefit the entire community.
>
> Mr. MEAD. The gentleman will see that the effort being made by the committee is in another direction

altogether. We are not in this bill concerned with the law that applies to mail boxes on rural routes. We are trying to apply the law that now applies to rural mail boxes apply to city letter boxes.

Mr. BLANTON. What time is a better time than right now to rectify this little injustice to the rural people? Is there any better time than now? I take it that the gentleman has never lived in a rural community.

Mr. MEAD. That is where I live some of the time.

Mr. BLANTON. Then he realizes the problems that beset the rural people. Some of them get their mail only twice a week, people who live away off in the mountains, and it is unfair to say to them that when they have a notice of high importance to the community, it can not be placed in the boxes. Suppose they were getting up a dance for the young people in the community. That is the only way they have to get word about it. They run around the circuit and put the notices in the boxes. Every time they do it they violate the law, but they do it just the same. We ought to stop it from being a violation of the law.

Mr. MEAD. At such time when the committee takes up the matter of revising the law as it applies to rural mail boxes, I shall be glad to consider the gentleman's amendment, but we are considering now only the application of the law to city mail boxes, and that is the only idea conveyed in the bill.

Mr. BLANTON. Does not the gentleman realize that such an amendment is a good one?

Mr. MEAD. Except that it would in my judgment conflict with the purpose of this bill which applies only to city mail boxes.

75 Cong. Rec. 5576 (1932).

In addition, a press release issued at the time the Postmaster General signed an order amending the Postal Regulations in terms similar to those of the statute, specifically mentions "political handouts" as well as "statements of account" and "advertising circulars," and notes the general problem created by all non-postaged material—that

"in many instances letter carriers have found it difficult to deposit mail in the overcrowded letter boxes, and in the larger cities this has worked considerable hardship on the carrier with a resultant loss of time." These contemporaneous records indicate that, although non-commercial matter was not the primary focus of Post Office Department or Congressional concern at the time the statute was enacted, it was intended to be within the scope of the statutory prohibition.

Plaintiffs argue, however, that if the statute is held to proscribe the deposit of non-commercial matter in mail boxes, it constitutes an impermissible abridgment of plaintiffs' First Amendment and related Constitutional rights.[3]

There can be no question that the right of freedom of speech and press embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938), and that door-to-door distribution is one of the most important and effective methods of disseminating ideas and preserving the tradition of free discussion. *Schneider* v. *State*, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155 (1938). As the Supreme Court noted in *Martin* v. *Struthers:*

> "Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is

[3] Plaintiffs do not challenge enforcement of the statute with respect to commercial matter. See *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4 (2d Cir. 1973); *B & M Ltd.* v. *Smith*, 351 F.Supp. 1057 (N.D. Ohio 1972). See also *Bigelow* v. *Virginia*, 421 U.S. 809, 825 n. 10, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

> essential to the poorly financed causes of little people." 319 U.S. 141, 145-46, [63 S.Ct. 862, 865, 87 L.Ed. 1313] (1942) (footnotes omitted).

The right to distribute information in this manner has been upheld against broad permit requirements, *Lovell* v. *Griffin*, *supra*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1941); prohibitions designed to curb litter, *Schneider* v. *State*, *supra*, a prohibition on knocking or ringing a doorbell to summon the occupant, *Martin* v. *Struthers*, *supra;* and a license tax on solicitation, *Murdoch* v. *Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

It is equally well-established, however, that First Amendment rights are not absolute, and that their exercise may be subjected to reasonable limitations "necessary to further significant government interests." *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 [92 S.Ct. 2294, 2303, 33 L.Ed.2d 222] (1972). The Constitution does not guarantee unqualified access to the streets or the doorsteps of individual homes. For example, a prohibition on door-to-door solicitation without the prior consent of the owner was upheld in *Breard* v. *Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), and the Supreme Court has repeatedly stated that a canvasser may be required to furnish identification or to conform to other requirements reasonably related to the state's interest in preventing fraud, other crimes, or unwarranted inconvenience to residents. See, *e.g.*, *Martin* v. *Struthers*, *supra*, 319 U.S. at 148, 63 S.Ct. 862; *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at 306, 60 S.Ct. 900.

In evaluating plaintiffs' claim, therefore, the Court must weigh the substantiality of the reasons advanced in support of the statute against the burden imposed on protected speech. Here the Government has asserted interests that are unquestionably legitimate, and significant. Unhampered access to a mailbox is clearly necessary to the efficient delivery of the mail. In addition, the Government argues that the statute will help to prevent postal theft by assuring that the use of a mailbox by anyone

other than an authorized letter carrier will arouse suspicion.

The task of balancing government interests against First Amendment rights is always difficult, and would perhaps be especially so here if the challenged statute imposed broad restraints on communication, comparable to those held invalid in *Martin* v. *Struthers* or *Schneider* v. *State*. In contrast to the regulations attacked in those cases, however, the statute at issue in this case is "narrowly tailored to further the [Goverment's] legitimate interest," *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116-117, 92 S.Ct. at 2303, and in fact imposes only a minimal burden on plaintiffs' activities.

The statute itself does not purport to *prohibit* door-to-door distribution of plaintiffs' community notices. Despite the asserted interest in protecting postal revenue, neither § 1725 nor any other statute or postal regulation requires the distribution of such non-commercial material through the mail. Nor does the Postal Service seek to prohibit deposit of plaintiffs' literature outside the mailbox. Thus plaintiffs are free to leave community messages on doorknobs, behind screen doors, and in similar locations. The existence of this alternative seriously undermines plaintiffs' claim that enforcement of the statute effectively prohibits their activity by imposing postage costs that volunteer community organizations cannot afford.

Plaintiffs claim—perhaps correctly—that messages left outside the mailbox are less likely to reach their intended audience. But the Constitution does not guarantee plaintiffs an absolute right to the most efficient or effective means of communication. A reasonable limitation on the exercise of First Amendment rights in furtherance of a legitimate and significant government interest may be permissible even if it forces individuals to use alternative means of communication that are somewhat more costly or less convenient. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77, 88-89, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

The Court therefore finds that § 1725 as applied to the distribution of non-commercial literature does not consti-

tute an unwarranted denial or abridgment of plaintiffs' constitutional rights.[4] Defendant's motion is therefore granted and the complaint is dismissed.

SO ORDERED.

[4]The Court rejects plaintiffs' argument, raised for the first time in its reply brief, that the direct deposit of non-postaged mail in letter boxes by civic organizations is protected from regulation under § 1725 by the operation of 18 U.S.C. §§ 1694 and 1696(c). These statutes proscribe distinct activities, and the extension of the exception contained in § 1696(c) to § 1725 would contravene the purposes of § 1725 described above.

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 329844 99

No. 80-608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE,

Appellant

—*v.*—

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

JURISDICTIONAL STATEMENT FILED: OCTOBER 14, 1980
PROBABLE JURISDICTION NOTED: JANUARY 12, 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-608

UNITED STATES POSTAL SERVICE,

Appellant

—*v.*—

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

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THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS

THE UNITED STATES POSTAL SERVICE, DEFENDANTS

JUDGE CONNER

Dist/Office—208-1

Docket Yr. Number—77-0483

Filing Date—02-02-77

J—2

N/S—440

0—1

Judge Number—0861

YR.—77

Docket Number—0483

Closed Record

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS, ET AL.

vs.

THE UNITED STATES POSTAL SERVICE

77 Civ. 483

CONNER, J.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2-2-77	1.	Filed complaint.
05-13-77	(4)	Filed ANSWER of deft. to the complaint. (U.S.A.)
07-27-77	(5)	Filed pltffs' affdvts. and notice of motion for an order pursuant to Rule 56 FRCP granting summary judgment in favor of pltffs . . . RET. 9-6-77.

DATE	NR.	PROCEEDINGS

09-01-77 (8) Filed Deft's Notice of Cross-Motion for an order dismissing the complaint. RET. 9-6-77.

03-30-78 (13) Filed Memorandum and Order—For all the reasons stated, The Court therefore finds that § 1725 as applied to the distribution of non-commercial literature does not constitute an unwarranted denial or abridgment of plaintiffs' constitutional rights.[4]. Defendant's motion is therefore granted and the complaint is dismissed. So Ordered. CONNER, J m-n

06-13-78 (16) Filed NOTICE OF APPEAL of Plaintiffs to USCA 2nd Circuit from final judgment.

11-24-78 19 Filed true copy of USCA Order and Opinion that the judgment of the dist. Ct. is reversed and the action is remanded to dist. Ct. for further proceedings.

06-28-79 — BEFORE CONNER, J NON-JURY TRIAL BEGUN and adj to 7-5-79.

07-05-79 — NON-JURY TRIAL CONTINUED.

07-06-79 — NON-JURY TRIAL CONTINUED AND CONCLUDED. Total Trial Days (3)

4-28-80 33 Fld OPINION #49978 & order—for reasons stated, deft. will be enjoined from enforcing 18:1725 against pltff Council's constituent civ. assns, as well as against the named pltffs; and the Ct. will enter judgm. decl. enforcement of the statute as to such groups in violation of 1st Amendment.

5-20-80 35 Fld FINAL JUDGMENT & ORDER that 18:1725 is unconstitutional as applied to . . . as listed; that the U.S. Postal Svc. is enjoine[d] from enforcing 18:1725 as to the civic organizations listed in this order; and this judgment is stayed for a period of 60 days from the date of its entry.

6-18-80 37 Fld deft's NOTICE OF APPEAL to the Supreme Court of the U.S.

7-28-80 38 Transcript of record of proceedings, dated 6/28, — 7/5&6 79.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civil Action No. 483

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND THE SAW MILL VALLEY CIVIC ASSOCIATION, PLAINTIFFS

—against—

THE UNITED STATES POSTAL SERVICE, DEFENDANT

JUDGE WILLIAM C. CONNER

COMPLAINT

Plaintiffs, by their attorney, Jon H. Hammer, complaining of the defendant, respectfully allege as follows:

JURISDICTION

1. This action arises under the Constitution and laws of the United States, and is brought pursuant to the provisions of Title 28, §§ 1331, 1339, 1343, 2201, 2202, Chapter 7 of Title 5 and Title 39, §§ 401, 409 of the United States Code.

2. This is a suit of a civil nature, requesting declaratory and injunctive relief, and further arises under the Constitution and laws of the United States and seeks to adjudicate and declare certain rights created and established pursuant to the provisions of Article I, § 8, Clause 7, and Article IV, Section 4 of the United States Constitution, as well as under the First, Fifth, Ninth and Tenth Amendments thereto.

3. Plaintiffs seek declaratory and injunctive relief declaring a certain federal statute and federal regulation

unconstitutional as against the plaintiffs, and all those similarly situated, and to establish and protect their rights under the First, Fifth, Ninth and Tenth Amendments to the United States Constitution, and those of all representative community, neighborhood, membership, civic, taxpayer and political organizations constituted in whole or in part of residents of the United States of America situated in the unincorporated area of the Town of Greenburgh, County of Westchester, State of New York, within the Southern District of New York, including those who maintain, own or use mail receptacles affixed, adjacent, or proximate to residential dwellings of a single family or multiple family nature.

4. Plaintiffs further seek declaratory and injunctive relief restraining and enjoining the defendant from enforcing against the plaintiffs, and all those similarly similarly situated, the provisions of 18 United States Code § 1725 and the regulations issued thereunder by the defendant, to wit, 39 Code of Federal Regulations § 146.2, and by reason of such enforcement abridging Constitutional rights of plaintiffs, and all those similarly situated, of freedom of speech, freedom of assembly, freedom of the press, and the right of the people peaceably to assemble and to petition the government for redress of grievances, and to maintain a Republican Form of Government guaranteed by the Constitution.

VENUE

5. Venue is properly laid in this Court pursuant to 28 United States Code, § 1391, 1402.

THE PARTIES

6. Plaintiff, Council of Greenburgh Civic Associations (hereinafter "The Council") is an unincorporated, politically non-partisan civil and community association, organized and existing under and by virtue of the laws of

the State of New York, having its principal place of operations in the unincorporated area of the Town of Greenburgh, County of Westchester, State of New York, within the Southern District of New York. The Council is an organization and federation representing and consisting exclusively of civic, community and neighborhood associations, and open to all of such organizations located in whole or in part in the unincorporated area of the Town of Greenburgh, and membership therein is composed only of bona fide non-political community, neighborhood, membership, civic and taxpayers' associations, located in whole or in part in the unincorporated area of the Town of Greenburgh, approximately 40 in number. The purposes and objectives of the Council, as set forth in its constitution, are as follows:

(a) To obtain and disseminate information concerning Town affairs that is of common interest to the Member Associations.

(b) To foster public interest in better government.

(c) To assist in maintaining good mutual understanding between citizens and Town officials.

(d) To promote public knowledge and the appreciation of public problems through non-partisan publicity and to alert public interest toward their solution.

(e) To study Town policies, planning, procedures, organizations, staffing, finances and like matters.

(f) To cooperate with other local, county, state and national groups having similar purposes.

(g) To promote concerted and intelligent action on any matters affecting common interest of Member Associations of the unincorporated area of Greenburgh.

(h) To encourage and assist in the formation of enlightened public opinion and increased general action in public affairs affecting the unincorporated area of Greenburgh.

(i) To foster cooperation and mutual assistance among Member Associations of the unincorporated area and to assist in the effective presentation of their views and those of the Council before governmental and private entities and the general public.

7. The Council has been duly authorized and directed to institute and maintain this action on behalf of its constituent membership and itself, pursuant to resolution duly adopted at a meeting held on August 10, 1976.

8. The plaintiff, Saw Mill Valley Civic Association (hereinafter "Saw Mill"), is an unincorporated, politically nonpartisan civic community and homeowner association, organized and existing under the laws of the State of New York, having its principal place of operations in the unincorporated area of the Town of Greenburgh, County of Westchester, State of New York, within the Southern District of New York. Saw Mill is a constituent member of the Council, and is geographically situated in a certain section of the Town of Greenburgh historically known as Fairview; and is composed of and represents approximately 525 family units situated within the aforesaid area. Saw Mill has the organizational capacity to raise the issues herein presented; its size and composition is reflective of the representative interests of the community which it seeks to protect, and the actions of the defendant herein complained of adversely impact upon the Constitutional rights of Saw Mill and its individual citizen members. The purposes and objectives of Saw Mill, as set forth in its constitution, are in pertinent part as follows:

(a) To promote interest in civic affairs in the community.

(b) To promote concerned and intelligent action on all matters affecting the common interests of the Saw Mill Valley.

(c) To ascertain, promote and develop effective action in the interests and welfare of the Town of Greenburgh and particularly that section of the Town in the vicinity of the Saw Mill Valley.

(d) To preserve the residential, park and semi-rural nature of the Saw Mill Valley neighborhood by promoting and influencing growth which is characteristic of and will further benefit that community.

(e) To inquire into civil abuses and to organize and obtain reforms thereof where necessary.

(f) To collect and disseminate information helpful to residents of the Saw Mill Valley.

(g) To encourage and assist in participation in public affairs affecting the community.

(h) To present the views of the Association and the problems of the residents of the Saw Mill Valley area before appropriate public and private bodies.

(i) To foster friendship, cooperation, and mutual assistance among the members of the community.

9. Saw Mill has been duly authorized and directed to institute and maintain this action on behalf of its constituent members pursuant to authorization dated August 12, 1976.

10. The defendant, the United States Postal Service (hereinafter "Postal Service"), is an independent agency in the executive branch of the government of the

United States, created and established under Title 39 United States Code § 201, and authorized under its general powers to sue and be sued in the name of the United States Postal Service, 39 United States Code § 401.

GENERAL ALLEGATIONS: THE CLAIM FOR RELIEF

11. On information and belief, in or about May of 1976 various members of the Board of Directors of Hilltop Farms Civic Association, a constituent member of the plaintiff Council in the same status as plaintiff Saw Mill, did cause to be distributed throughout its civic association area a notice scheduling a civic association meeting at the local Town Hall, for June 3, 1976. Said notice was apparently hand-delivered, without any postage thereon, by volunteers and deposited in the mail boxes or receptacles affixed to the residential dwellings of the various members of the Hilltop Farms Civic Association. A copy of said notice is annexed hereto as a part of this complaint and designated as Exhibit "A".

12. In or about sometime during the first week of June 1976 Saw Mill did, in furtherance of its objectives as specified in Paragraph "8" above, in accordance with its continuing policy of communicating with and developing an informed citizenry and electorate, and in the exercise of rights guaranteed under the First Amendment to the United States Constitution, cause to be hand-distributed a civic association newsletter and agenda for a meeting duly noticed on June 7, 1976. A copy of said notice is annexed hereto and designated as Exhibit "B".

13. The exigencies of time, logistics and economics dictated, as has been the case in the past, and as was, on information and belief, the case with the Hilltop Farms Civic Association notice annexed as Exhibit "A", that the Saw Mill notice (Exhibit "B"), and other distributions of a similar nature, be hand-delivered by volunteers to reach constituent member dwelling and

there desposited in the mail box or receptacle attached to each dwelling place of a member, and without any postage thereon. The costs of first class mailing, the delays inevitably incident thereto, and the minimal time periods available for civic representative to protect their community and property interests by calling meetings prior to the necessity to respond to material matters of community concern scheduled for immediate public hearing by various official public bodies, mandate that such notices be delivered in the aforesaid manner, and not by means of any postal facilities of the defendant. There is available to Saw Mill, and others acting in a similar manner, such as The Council, the Hilltop Farms Civic Association, and the numerous other homeowner organizations which are constituent members of the plaintiff Council, as a practical manner of delivery only the hand deposit of such various notices in the mail boxes or receptacles of the various citizen-homeowner within the community in the manner as aforesaid.

14. By reason of a period of many years experience, acceptance and acquiescence, and not one known interposition of any objection to such deposit, the citizen residents in the unincorporated area of the Town of Greenburgh have implicitly authorized and agreed to receipt of various community, civic and electioneering notices by the deposit of same in their mail boxes or receptacles, either affixed to their dwelling or located in a rural type mail box adjacent to the roadway in front of their dwelling, in the manner as above described. All of the foregoing procedures have been for a period of many years in the past, and are presently being, utilized by the plaintiffs herein, and others similarly situated, as the only practical, feasible and economical manner for their exercise of their rights guaranteed to the citizenry under the First Amendment to the United States Constitution and the means available to maintain a Republican Form of Government, as guaranteed by Article IV, Section 4 thereof.

15. On June 2, 1976, a duly authorized representative of the defendant herein, purportedly acting within the scope of his authority and in his official position as Postmaster for the United States Post Office located at White Plains, New York—covering a portion of the unincorporated area of the Town of Greenburgh—did cause a letter to be directed to one Fridtjof Schroder, Chairman of the Board of plaintiff Saw Mill. The aforesaid letter of the defendant, dated June 2, 1976, annexed hereto as Exhibit "C", informed and advised Saw Mill that its deposit of Civic Association notices, of the type annexed hereto as Exhibits "A" and "B", in mail boxes or receptacles attached to or adjacent to individual residential dwellings, and without the affixation thereto of any first class postage, was illegal, contrary to United States Postal Regulations, to wit, 39 C.F.R. §146.2 and a violation of the Criminal Code of the United States, 18 United States Code §1725.

16. By reason of the foregoing, and since in or about June of 1976 plaintiff Saw Mill and plaintiff The Council, and others similarly situated, have been unlawfully and unconstitutionally inhibited and precluded from properly, effectively and in a feasible and practicable manner communicating with their civic constituents, so that the citizen-members thereof have been subjected to an abridgment and denial of certain Constitutional rights, as have been the plaintiffs herein, to wit:

(a) their right of free speech, guaranteed under the First Amendment to the United States Constitution;

(b) their right of free press, guaranteed under the First Amendment to the United States Constitution;

(c) their right of free association as citizens of the United States and of the State of New York;

(d) their right to peaceably assemble, guaranteed under the First Amendment to the United States Constitution;

(e) their right to petition the Government for a redress of grievances, guaranteed under the First Amendment to the United States Constitution;

(f) their rights as citizens of the United States and of the State of New York to protect and preserve a Republican Form of Government, guaranteed to the States and the subdivisions thereof under Article IV, Section 4 of the United States Constitution;

(g) and further deprived of certain liberty and the practical ability to protect their property rights, in a manner contrary to due process of law, guaranteed under the Fifth Amendment to the United States Constitution;

(h) and further abridged of certain rights retained by the people, under the Tenth Amendment to the United States Constitution;

(i) and further abridged in the exercise of certain powers reserved to the people, under the Tenth Amendment to the United States Constitution.

17. On June 9, 1976, a representative of the plaintiffs herein did communicate with the office of the General Counsel of the United States Postal Service in Washington, D.C., in order to ascertain whether the written advice of the Postmaster in White Plains, New York, by letter dated June 2, 1976 (Exhibit "C") was the formal position of the United States Postal Service; and further whether it was the policy of said defendant to enforce the provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2 as against non-partisan, non-commercial, civic and taxpayer notices of the type submitted by Saw Mill and the Hilltop Farms Civic Association, annexed hereto as Exhibits "A" and "B", respectively. A copy of said letter of inquiry is annexed hereto as Exhibit "D".

18. On July 19, 1976 by letter of the Assistant General Counsel of the Law Department of the United States Postal Service, the representative of the plaintiffs was formally advised that the position espoused by the United States Postmaster in White Plains, New York on June 2, 1976 constituted the formal policy of the United States

Postal Service, and was to the effect that: civic notices of the type here before this Court are within the scope, purview and criminal sanction provisions of 18 United States Code § 1725, and presumably the regulations issued thereunder in 39 C.F.R. § 146.2; that said civic notices may only be deposited in individual homeowner mail boxes or receptacles by representatives of the United States Postal Service after having had affixed thereto the required first class mail postage and following deposit in the ordinary manner of first class mailing. As a result, plaintiffs, and their representatives, directors, officers and members, are thereby placed in jeopardy of criminal prosecution by pursuing the customary manner of conducting civic association operations, and in their exercise of certain rights guaranteed under the United States Constitution.

19. By reason of the foregoing, there is a clear case and controversy in regard to the construction, interpretation and enforcement of the aforesaid United States Code provisions, and the complementary regulations issued by the United States Postal Service, requiring a declaration by this Court construing the provisions thereof and adjudicating the rights of the plaintiffs, and of all those similarly situated, under the United States Constitution for the asserted abridgement of their rights thereunder, as specified in Paragraph "16" hereinabove.

20. In addition to civic associations, such as the plaintiffs herein, other persons or entities utilize such personal hand-delivery of materials, and placement of same in mail boxes or receptacles affixed to residential dwellings without postage affixed thereto, other than the regular postal facilities of the defendant, as the only practicable available means of communication with their constituents; to wit, candidates for local school boards, school district budget proposals, referenda and newsletters, and municipal taxing authorities providing fire protection services in the Town of Greenburgh pursuant to the Town Law of the State of New York, e.g. the Fairview

Fire District and the Hartsdale Fire District. Annexed hereto as Exhibits "F" and "G" respectively are copies of the Hartsdale Fire District newsletter distributed on August 30, 1976, and a distribution on behalf of the Hartsdale Volunteer Fire Department distributed on October 11, 1976, both in the manner as aforesaid.

21. The construction, application and enforcement by defendant of the provisions of 18 United States Code § 1725, and the applicable Postal Regulations, would and do materially inhibit and restrain the foregoing individuals, entities and municipal authorities from exercising their right of communication with their constituencies, thereby constituting a prior restraint on the exercise of free speech, and freedom of the press, as well as a further inhibition upon the constituents thereof from petitioning their government for any redress of grievances, as alleged in Paragraph "20" above.

22. In addition to the civic associations such as the plaintiffs herein and entities and municipal authorities referred to in Paragraphs "20" and "21" hereinabove, during the course of the late electoral canvas culminating in election day November 2, 1976, various individual candidates for local, state and national office did cause to be distributed within the Town of Greenburgh diverse political materials, in order to communicate with their prospective constituencies; said materials and political brochures were in large part distributed by hand and deposited in mail boxes or receptacles affixed to or within residential dwellings, without the affixation thereto of any first class mail or other postage. It is believed that this means of distribution is in general use by all political parties and individual candidates throughout the County of Westchester, the State of New York, and the several States of the United States of America. Annexed hereto as Exhibits "H" through "N" are the following examples of such materials hand-delivered in the aforesaid manner in the Town of Greenburgh during said electoral canvas:

EXHIBIT	DATE	NAME OF CANDIDATE	OFFICE
H	10/76	Jimmy Carter/ Walter Mondale	President/Vice President
I	9/76	Patrick Moynihan	U.S. Senator
J	10/76	Patrick Moynihan	U.S. Senator
K	9/76	J. Edward Meyer	U.S. Congressman
L	10/76	J. Edward Meyer	U.S. Congressman
M	10/76	Linda Winikow	New York State Senator
N	10/76	Arthur A. Litt	Justice, Supreme Court, State of New York, 9th Judicial District

23. The construction, application and enforcement by defendant of the provisions of 18 United States Code §1725, and the applicable regulations, would and do materially inhibit and restrain the foregoing individuals from communicating with their prospective constituencies, thereby imposing upon said individuals, and others similarly situated, acting in the context of a political election spectrum, a prior restraint on their exercise of free speech guaranteed under the First Amendment to the United States Constitution; the construction, application and enforcement by defendant of the foregoing provisions of the United States Code, and the applicable regulations, are thereby such as to materially inhibit the maintenance of a Republican Form of Government to the several States and the subdivisions thereof, as guaranteed under Article IV, Section 4 of the United States Constitution; the construction, application and enforcement by defendant of the foregoing provisions of the United States Code, and the applicable regulations, are such as to discriminate in the course of the election processes in favor of the candidate, candidates or political parties with substantial financial resources and against a candidate, candidates or political parties without substantial financial resources, thereby denying to the latter certain liberties guaranteed under the United States Con-

situation, and more particularly the Fifth Amendment thereto.

24. The provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2, as here applied and enforced by the defendant against the plaintiffs, and others similarly situated, is not within the authority of the United States and the United States Postal Service or the Congress of the United States, as authorized and intended by the provisions of Article I, Section 8, Clause 7 of the United States Constitution, granting to the Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution" the power; "To Establish Post Offices and post Roads", in that the provisions of the United States Code and the applicable Postal Regulations here complained of are in conflict with the rights of the plaintiffs, and others similarly situated, as guaranteed under the provisions of the United States Constitution, all to the extent specified and enumerated in Paragraph "16" hereinabove; and said statute and regulation are therefore in all respects unconstitutional, void and unenforceable.

25. The provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2 purport by their terms and provisions to cover various types of commercial distributions; and same are not intended to and do not encompass the distribution of various materials here cited, which are essential in order for the exercise of certain rights guaranteed to the plaintiffs, and others similarly situated, under the Constitution of the United States; and the enforcement, construction and application by the defendant of the foregoing statute and regulations against the plaintiffs, and others similarly situated, is therefore in all respects unconstitutional, unlawful and void against plaintiffs, and others similarly situated.

26. Plaintiffs have no adequate remedy at law.

27. No previous application for the relief herein sought has been made in this or any other court of competent jurisdiction.

WHEREFORE, plaintiffs pray for judgment and relief as follows:

1. That a declaratory judgment issue declaring:

(a) That the distribution by plaintiffs, and others similarly situated and all others referred to in the complaint herein, of civic educational, political and municipal materials of a non-commercial nature, by personal non-public hand-delivery of same in mail boxes or receptacles attached to personal residential single or multiple family dwellings and without the affixation of any postage thereto, by means of facilities other than regular postal delivery by defendant, be in all respects declared to be lawful and a proper and a legitimate exercise of certain rights guaranteed under the Constitution of the United States.

(b) That the enforcement and application by defendant of the provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2 to personal distribution of the type of civic, political, educational and municipal materials of a non-commercial nature by hand-delivery of same in mail boxes or receptacles attached to or within personal residential dwelling places, and without the affixation of any postage thereto, and by other than the regular postal facilities of the defendant, be declared to be an unlawful and improper abridgement of the rights of the plaintiffs, and others similarly situated, guaranteed under the Constitution of the United States.

(c) That the application by the defendant of the provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2 against the plaintiffs, and others similarly situated, is unlawful, void and unconstitutional, in that same violates certain rights guaranteed by the Constitution of the United States.

(d) That the provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2 are in all respects unlawful, void and unenforceable, in that they are violative of

certain rights guaranteed by the Constitution of the United States.

(e) That the provisions of 18 United States Code § 1725 and 39 C.F.R. § 146.2 are, as against the plaintiffs or others similarly situated, or in all respects, in excess of the power to enact laws granted by the Constitution to the Congress; and that said law, and the applicable Postal Regulations, are therefore in all respects unconstitutional, void and unenforceable.

2. That a permanent injunction issue, restraining the defendant, its agents, employees, subordinates and all others acting on its behalf, from in any way enforcing the provisions of 18 United States Code § 1725 and 39 C.F.R. § 1426.2 as against the plaintiffs, and other similarly situated, in regard to the personal distribution of educational, civic, political and municipal materials of a non-commercial nature by hand-delivery of same in mail boxes or receptacles attached to or within private residential dwellings, without the affixation of any postage thereto and not by means of the regular postal facilities of the defendant.

3. Granting to the plaintiffs such other and further relief as to this Court may seem just and proper, including costs and disbursements, and in the discretion of the Court any allowable attorney's fees which may be properly awarded as against the defendant in favor of the plaintiff.

Dated: New York, New York
February 2, 1977

/s/ Jon H. Hammer
JON H. HAMMER
Attorney for Plaintiffs
330 Madison Avenue
New York, New York 10017
(212) 682-0670

INDEX TO EXHIBITS

EXHIBITS	DESCRIPTION
A	Hilltop Farms Civic Association hand-delivered distribution to members, May, 1976.
B	Saw Mill Valley Civic Association distribution hand-delivered to members, June, 1976.
C	Letter of June 2, 1976, from U.S. Postmaster, White Plains, N.Y., to Fridtjof Schroder, Chairman, Saw Mill Valley Civic Association, alleging violation of Postal Regulations, etc.
D	Letter of Plaintiffs' legal representative, June 9, 1976, to General Counsel, U.S. Postal Service as to applicability of 18 USC § 1725 to civic distributions.
E	Letter of Assistant General Counsel, U.S. Postal Service, July 19, 1976, confirming applicability of 18 USC § 1725 to civic distributions.
F	Newsletter of Hartsdale Fire District hand-delivered, August, 1976.
G	Hartsdale Volunteer Fire Department 1976 Bicentennial fund drive letter, hand-delivered, October, 1976.
H	Political brochure, Jimmy Carter/Walter Mondale, hand-delivered, October, 1976.
I	Political brochure, Patrick Moynihan, hand-delivered, September, 1976.
J	Political brochure, Patrick Moynihan, hand-delivered, October, 1976.
K	Political brochure, J. Edward Meyer, hand-delivered, September, 1976.
L	Political brochure, J. Edward Meyer, hand-delivered, October, 1976.
M	Political brochure, Linda Winikow, hand-delivered, October, 1976.
N	Political brochure, Arthur A. Litt, hand-delivered, October, 1976.

EXHIBIT 'A'

HILLTOP FARMS CIVIC ASSOCIATION

TO ALL NEW AND LONG-TIME RESIDENTS OF HILLTOP FARMS:

THE EXISTENCE OF YOUR CIVIC ASSOCIATION IS IN DANGER!!

IT IS IMPOSSIBLE TO EXIST IN THIS AREA WITHOUT A CIVIC ASSOCIATION. WE NEED OPEN COMMUNICATION IN HILLTOP FARMS. ALL IDEAS AND COMPLAINTS MUST BE DISCUSSED. THIS IS IMPOSSIBLE UNLESS YOU ARE WILLING TO AT LEAST ATTEND ONE GENERAL MEETING.

WE WILL TRY TO COVER *EVERY AREA OF INTEREST AND IMPORTANCE TO HILLTOP RESIDENTS.* THIS MEETING WILL ALSO GIVE US AN OPPORTUNITY TO ESTABLISH AN ACTIVE AND INTERESTED HILLTOP FARMS CIVIC ASSOCIATION COUNCIL.

WE HAVE RESERVED THE TOWN HALL MEETING ROOM FOR THURSDAY, JUNE 3 AT 8:30 P.M.

PLEASE TRY TO ATTEND. WE SPEND SO MUCH TIME AND MONEY ON OUR HOMES, LET'S SPEND A FEW HOURS ON OUR NEIGHBORHOOD!
THANK YOU FOR YOUR COOPERATION.

CIVIC BOARD MEMBERS

DISTRIBUTED

MAY, 1976

EXHIBIT 'B'

SAW MILL VALLEY CIVIC ASSOCIATION

The Second Quarterly Meeting of the
Membership of the Association—1976

ELECTION NIGHT

Date: June 7, 1976—Time: 8:00 PM
Place: St. Joseph of Arimathea

AGENDA

1. Communications: Among these are:

   (a) The Association now has the status of a non-profit association. We have been requested to make one important point clear: The dues which establish you as a voting member ($4.00) each year they are paid—or any other contribution—are not tax deductable.

   (b) The Saw Mill Valley Environmental Steering Committee has been established to facilitate the creation of a District for Flood Control, Conservation and Recreation under the jurisdiction of the County of Westchester. Besides working to find alternatives for flood control a major aim of the committee is to create a lineark park through the length of the river valley in Westchester, using the Putnam Railroad (now in the reluctant hands of Conrail) as a bike trail.

   This committee came into being through the support of the Executive Committee of this Association. This venture, which we firmly intend to see accomplished, should have a significant impact upon the quality of life (and land values) in this Valley. The committee consists of: Robert Barren, Esq., Secretary; John Buckley, Esq., Pleasantville Home Owners;

Carol Coggeshall, Audubon Society; Jon Hammer, Esq., Environmentalists, Bar Association, Westchester; Drew Panko, Council Greenburgh Civic Associations; Fridtjof Schroder, Chairman; Advisory: Leo Alperson, Businessman; Ted Buckley, Boyce Thompson Institute; Laurence Rockefeller, Esq., Natural Resources Defense Council: Ex Officio: Westchester Commissioner, Peter Eschweiler, Frank Bohlander, Joseph Caverly.

Late in June, elected and appointed officials of the various affected municipalities will be invited to be representatives on the committee.

2. Announcement: *Mr. Paul Rosenzweig* elected vice-chairman of the Council of Greenburgh Civic Associations; *Mr. Michael Pizzolla* elected a Governor of the Council of Greenburgh Civic Associations.

3. Election of Officers and Executive Committee Members for 1976-77.

Only dues paying members of the Association are eligible to hold office. Mr. Harry Bender has sought out candidates for these positions. Those who have spoken in the affirmative *and are members in good standing* are listed on the reverse side of this agenda. An amendment to the constitution has been declared necessary, amending an amendment voted at the 2nd Quarterly Meeting of 1974 (Article IX, Executive Committee) to permit membership on the committee by those who are pressed for time and cannot attend as often as they might wish.

Positions to be filled: Chairman, Vice Chairman, Treasurer, Secretary, Membership Chairman.

Those who have indicated they will accept a position are:

Vincent Aglieco *	Michael Pizzolla
Louis Barone *	Alfred Revzin
Harry Bender *	Norma Revzin *
Harriet Cadoff	Claire Rosenzweig *
Donald Cutler *	Paul Rosenzweig *
Raymond Frascene *	John Scheib *
Hyman Goldflies *	Caroline Schroder *
Jeanette Goldflies *	Fridtjof Schroder
Barry Littman	Dolores Sonne *
Marilyn Littman *	Amy Sullo *
John MacGuffie *	John Thorne *

Barry Kreisberg *

3. Continuing discussion of East Rumbrook Park. The Executive Committee has expressed concern over the 8 ft wide road-bike trail through the length of the park.

4. West Rumbrook Park archery organized by a private group in cooperation with the Greenburgh Recreation Commission.

   Mr. Parick Cristello, Chairman of the Archery Club will come accompanied by members of the Club explain the nature of their sport, bringing with them examples of their equipment. Possibly some of the members of this Association and/or their children might wish to obtain lessons and possibly, in time, join the club.

5. The Greenburgh Police Department will send some of its officers to this meeting to discuss their role in law

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* These have indicated interest in only being on the executive committee. However, sometimes minds change.

enforcement, youth programs, and home security. Considering our keen concern about matters such as this all the members that can make it to this meeting should come so as to be better informed. Come prepared to ask pertinent questions that are of vital concern. Police Chief Singer informs me they wish to present as positive a view as possible. THIS IS YOUR OPPORTUNITY

EXHIBIT 'C'

Postmaster WWR:bhe

UNITED STATES POST OFFICE

White Plains, New York

June 2, 1976

Mr. Schroeder
18 Bilton Road
White Plains, N.Y. 10607

Dear Mr. Schroeder:

It has been brought to my attention that you have deposited first class mail without postage affixed in the Hilltop Farm Area on the following streets:

Surrey Way
Hilltop Lane
Surrey Close
Primrose Street
Oakridge
Bonnie Briar Road

This practice is illegal and postage can be charged for each item distributed in that manner. The enclosed copies of Postal Regulations pertaining to this subject are self-explanatory. You must conform to these regulations or face a fine up to $300.00.

Very truly yours,

/s/ Walter W. Rostenberg
WALTER W. ROSTENBERG
Postmaster

EXHIBIT 'E'

[SEAL]

LAW DEPARTMENT

Washington, DC 20260

July 19, 1976

Our Ref: JTD:cab
36-D-3

Jon H. Hammer, Esq.
12 Westway
Hartsdale, NY 10530

Dear Mr. Hammer:

This replies to your letters concerning the placing of material not bearing postage into mailboxes.

Sometime in May, 1976, the Hilltop Farms Civic Association distributed a number of notices, "THE EXISTENCE OF YOUR CIVIC ASSOCIATION IS IN DANGER." The notices did not bear postage and were placed into mailboxes. In a letter dated June 2, 1976, the postmaster, White Plains, NY, said the practice was illegal, postage could be charged for each item distributed, and continuation of the practice could result in a fine not in excess of $300.

You inquired whether (a) the distribution of the notices was prohibited by § 1725 of Title 18, U.S. Code, and (b) a distinction exists between a mailbox placed at the front of a homeowner's property line and a mailbox attached near the front door of the homeowner's home. Section 1725 of Title 18, U.S. Code, provides:

> "Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage

> has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300."

Without regard to whether the mailbox is placed at the property line or is attached to the house near the door, in each instance, the box is a letter box ". . . accepted by the Postal Service for the receipt or delivery of mail matter" on a mail route. Accordingly, no distinction exists between a mailbox located at the property line and a mailbox attached to the house near the door. We have examined a copy of the May, 1976 notices distributed by the Hilltop Farms Civic Association. In our opinion, the prohibitions in § 1725 extend to the notices. Accordingly, it is our further opinion that the postmaster correctly stated that the placing of such materials not bearing postage into the mailboxes was illegal and subjected the person so doing to a fine of not in excess of $300.

Recently a United States Court of Appeals and a United States District Court upheld the legality of restricting mailboxes to matter bearing postage. *Rockville Reminder, Inc.* v. *United States Postal Service* (2nd Cir.) 480 F.2d 4 (1973), and *B&M Ltd.* v. *Smith* (D.C.N.D. Ohio, E.D.), 351 F.Supp. 1057 (1972).

In the early 1930's, a number of utility companies began to deliver their own bills by their own employees who placed the bills into mailboxes. A substantial loss of mail volume, with a resulting reduction in postal revenues, was feared. As a result, in 1934, Congress enacted the law, now codified in § 1725 of Title 18, U.S. Code. When enacted, the main purpose of this statute was to protect postal revenue. In the Postal Reorganization Act of August 12, 1970, Public Law 91-375, Congress imposed a

mandate upon the United States Postal Service to become self sustaining. We are sure you are aware of the Postal Service's current need for additional revenue. Hence, the need to protect postal revenue is at least as important today as it was in 1934.

In addition to protecting postal revenue, § 1725 has other beneficial effects.

If a person can go to a mailbox and place something into it, he can also take something out. Today, if a person other than a postal employee or a member of the family opens a mailbox, suspicion should be aroused. Hence, § 1725 contributes to the security of mail in mailboxes.

Most mailboxes are not very large. If material not bearing postage could legally be placed into mailboxes, it is reasonable to assume that from time to time such matter could either completely fill the mailbox and prevent any mail from being placed therein, or could prevent a good deal of the mail from being placed therein. In such situations, the Postal Service would be required to return the undelivered mail to the post office and the service afforded to the owner of the mailbox would deteriorate.

There would also be no practical way, other than by an injunction, for the owner to prevent the mailbox from being used to deliver such material to him. We have to anticipate that, in the absence of § 1725, the amount of such material which would be placed in mailboxes would sharply increase. We believe it reasonable to assume that an owner who might not object to having a particular item, for example, a notice from his civic association, placed into his mailbox, would not want to find himself unable to prevent his mailbox from being used to deliver other material. Confronted with what is essentially an "all or nothing" situation, the great majority of mailbox owners would, in our opinion, prefer the existing situation in which material cannot be placed into mailboxes to avoid payment of postage.

We recognize that from time to time, § 1725 may cause owners of mailboxes to become irritated. When all factors are brought to their attention, however, we are confident that the great majority of the public would agree that it is a reasonable exercise of the power of Congress.

Sincerely,

/s/ Jack T. DiLorenzo
JACK T. DILORENZO
Assistant General Counsel
Opinions Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
77 Civ. 483 (WSS)

THE COUNCIL OF GREENBURGH CIVIC ASSOCIATION
and the SAW MILL VALLEY CIVIC ASSOCIATION,
PLAINTIFFS

—*v*—

UNITED STATES POSTAL SERVICE, DEFENDANT

ANSWER

The defendant, United States Postal Service, by its attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, for its answer to the Complaint upon information and belief:

1. Admits the allegations of paragraphs 1 of the Complaint except denies that jurisdiction is conferred by 28 U.S.C. §§ 2201-02 (1970).

2. Neither admits nor denies the allegations of paragraphs 2 and 3 of the Complaint as they are allegations to which no responsive pleading is required.

3. Neither admits nor denies the allegations of paragraph 4 of the Complaint except avers that 18 U.S.C. § 1725 (1970) and 39 C.F.R. § 146.2 and the enforcement thereof are constitutional.

4. Denies the allegations of paragraph 5 of the Complaint except admits that venue is proper under 28 U.S.C. § 1402.

5. States that it lacks information and knowledge sufficient to form a belief or to the truthfulness of the allegations contained in paragraphs 6, 7, 8, 9, 11, 12, 13, 14, 22 and 27.

6. Admits the allegations of paragraph 10 of the Complaint.

7. Answering paragraph 15 of the Complaint admits that a letter dated June 2, 1976 was sent to Mr. Schroder and respectfully refers the Court to the text of that letter.

8. Denies the allegations of paragraphs 16, 19, 20, 21, 23, 24, 25 and 26 of the Complaint.

9. Answering paragraph 17 of the Complaint, admits that a letter dated June 9, 1976 was sent to the General Counsel of the United States Postal Service and respectfully refers the Court to the text of that letter.

10. Denies the allegations of paragraph 18 of the Complaint except admits that a letter dated July 19, 1976 was sent by the Assistant General Counsel of the Law Department and respectfully refers the Court to the text of that letter.

Dated: New York, New York
May 9, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: /s/ _____
MARY C. DALY
Assistant United States Attorney

TO: Jon R. Hammer, Esq.
330 Madison Avenue
New York, New York 10017

EXCERPTS FROM TRANSCRIPT OF HEARINGS
E. PAYSON CLARK, JR.
DIRECT EXAMINATION

* * * * *

[5] Q Mr. Clark, can you describe for us the Town of Greenburgh in terms of its population, approximate size, the governmental make-up, just briefly, so we can have some idea as to how it was created and situated?

A The Town of Greenburgh is one of the largest in the State of New York. It has a population of about 90,000 inhabitants, roughly equally divided between the unincorporated area of the township and six incorporated villages.

The township in many respects is a representative of much of the United States, outside of the most intense urban core centers, in that it has significant industrial development, such as one of the [6] largest General Motors assembly plants. It has significant commercial development, large commercial shopping centers on its central avenue and other arterial highways.

It has a significant element of low income, publicly subsidized housing. It has areas of substantially dense population, apartment development, as in the Hartsdale Avenue area. It has also many small-lot, one-family homes, and although they are not entirely legal under the zoning ordinance, areas in which there is in fact two-family occupancy and areas including low-density, high-acreage residential, almost estate-type developments, verging between the rural and close to the center city, virtually the full range of suburban community characteristics.

MS. DALY: Your Honor, I would like to note, as least from my perspective, Mr. Clark is reading from notes, and I would simply ask that he testify without the aid of notes, unless the notes are introduced or it appears that the witness cannot testify without the use of such notes.

Q Can you please testify from you recollection, Mr. Clark, in response to my questions?

A Surely.

[7] Q Are you personally familiar with the views of the people in the community as to how they maintain their homes, physically?

A Yes, I am.

Q Based upon—

A From activity over the years.

Q Are you familiar with the socio-economic mix of the Town of Greenburgh, and can you describe it briefly from one range to another, if that is appropriate?

A. Yes. It is representative of—in some areas, aufflent middle-class neighborhoods, where there are very high residential property values.

It extends to working class, blue-collar neighborhoods, and it includes also significant minority and ethnic populations and people with very limited resources, who are dependent on public assistance and public housing in significant part, too.

* * * * *

[15] * * * Where did you get the material and how?

A Walking from home to home and placing notices in the privately owned mailboxes of the resident home owners of the affected neighborhood.

Q Was any postage affixed to any of those notices?

A None.

Q Ever?

A Never in that fashion of distribution.

Q Did you ever receive any complaints from any members of the communities as to this behavior?

A Not in 23 years of distributing thousands and thousands of pieces of civic, non-commercial information.

Q Did you ever on any occasion deposit any commercial material?

A Never.

Q To your knowledge, based upon your own experience, do you know whether utility companies deposit materials of this nature in Greenburgh mailboxes?

A Never to my knowledge, nor have I heard of any report or discussion of its occurring from any people with whom I have had discussions or from whom I [16] have received information.

Q Now, Mr. Clark, based upon your 23 years' experience that you have just described, do you have an opinion, with a reasonable degree of certainty, as to whether or not people expect to receive civic notices in this manner that you have described?

A I do have an opinion.

Q Can you tell us what that is?

A In my opinion and personal experience people expect and gladly receive such communications and have acted dramatically in response to them.

Q Do they expect it to be received in this manner to the exclusion of any other, or is there some other manner in which they also expect to receive it?

A There is no other practical mode of distribution of non-commercial notices that is effective, of which I am aware of of which anyone has acquainted me.

Q My question, Mr. Clark, was whether you had an opinion as to whether people expect to receive it in some other manner.

A No. They don't so expect. In fact, they would resent any other distribution, and they would be in many cases opposed to and unsympathetic to any other than the expected, customary, acceptable and invited [17] mode of communication.

THE COURT: You say the citizens would be offended if they got something through the mail from one of those community groups?

THE WITNESS: No, your Honor. I was thinking of other modes of communication, such as littering their property, emblazoning it in some way, which would require you as a home owner to remove litter from your property or from your home.

Q Mr. Clark, you testified that you are familiar with the workings of the various local civic associations in the Town of Greenburgh.

A Yes sir.

Q Can you tell me approximately how many there are in the Town of Greenburgh, to your knowledge?

A There are about forty-five to fifty-five neighborhood civic groups.

Q And are they all active, viable organizations?

A They vary greatly in their activity and their viability. Some are long established, active, functioning institutions. Others are like a volunteer fire department; they don't meet nor alert themselves until something of vital concern to their neighborhood [18] occurs. Then they cease suspended animation and become intensely active and productive until the matter is resolved.

Q And can you tell us whether the various civic associations represent different socio-economic strata of the populous in town, or is it all the same?

A The civic groups are not uniform. They are greatly diverse.

Q In terms of socio-economic basis, I am talking about.

A Yes sir. The encompass every class, race, background, persuasion, socio-econmic status, economic bracket, wealth, poverty. There are no distinction. There is great variety.

Q Do you have any knowledge with respect to the economic basis, if any, which supports these civic associations?

A The economic basis if the unpaid and unrewarded voluntary service of a few of their residents who maintain the organization.

Q Let me rephrase that.

Do you have any knowledge as to how they raise funds or the source of funds?

A Their sources of funds are based on usually [19] voluntary appeals for the payment of dues in modest

amounts, ranging from one to about five or seven dollars, as a representative range. These are voluntary. If they are not paid, there is no tax in rem proceeding, and there is no social ostracism for failure to pay dues.

Q Do those civic associations vary in size, both in geography and number of home-owner residents?

A They do vary greatly in numerical size and in geographical territory, but about two-thirds of them or more are below two hundred families in total membership, that is, the total number of families residing in a geographical area.

There are some exceptions, which are much larger. They are the exception.

Q Based upon your knowledge of the civic groups, do you have an opinion with a reasonable degree of certainty as to whether or not the civic groups have the dollar proceeds with which to use the United States Postal Service, either by first-class mail or third-class mail, in terms of distributing civic materials?

MS. DALY: Objection, your Honor, unless the witness can testify that he is familiar with the third-class mailing rates.

[21] THE COURT: Do those civic groups with which you are familiar have the wherewithal to send out their communications to members and prospective members through the United States Postal Services?

THE WITNESS: Your Honor, the average civic association—there are honorable wealthy exceptions—has about $150 or so in the treasury. That is a representative average figure, and the problem is that the money is not sufficient to do more than possibly one mailing.

There is a factor, your Honor, that involves money in addition to the postage rate, even a beneficial bulk rate, and the problem is this: if you do as I did for so many years, put your notice in your neighbor's mailbox without postage, he gets and reads it and will respond to it.

If you use the mails, sir, quite aside from the questions of exigencies of time and logistics, you have to properly

address by name and street number every pamphlet in your civic association.

The problem there, sir, in my own Secor Woods neighborhood, we had approximately 552 families. The average suburban home ownership changes in about [22] 5 years, so twenty percent of your membership would be changing names and addresses in the entire year.

Now, if you have a big organization, like government, and you have computers and data processing facilities, you can buy up-to-date mailing lists that would be accurate for every geographical area, if money were no object, and then you can put the stamps on, even at a favorable bulk mailing rate, and you can reach your constituency. But the average civic association is staffed by volunteers, and the problem is, how do you, with a limited number of days to deal with a genuine issue of concern to your neighbors, how do you get the word to them so they can go and speak to their government in a timely fashion?

You cannot write out all the names and addresses by hand. They usually aren't that number of people available, and there isn't that much time to do it. So from an economic viewpoint you don't have the resources of a government or a great corporation or agency, and thus you cannot by name and street number reach the constituency in a limited amount of time.

Q Mr. Clark, I believe the judge asked you, do civic associations have the financial wherewithal [23] to mail—

A Most do not.

Q Do you have an opinion as to whether they do or not?

A Yes; I have an opinion.

Q And what is it?

A My opinion is that they do not have the facilities.

Q Now, Mr. Clark, to your knowledge, do issues in the community that confront civic associations generally arise on long-term notice or short notice?

A Most issues tend to arise on relatively short notice. On some occasions, almost a matter of overnight, civic reaction needs to be taken.

Q Do issues come up at Town Board meetings?

A Sometimes without any real awareness within the affected community, that has happened.

Q Does the Town Board submit an agenda to the civic associations in advance?

A Sometimes agendas are circulated a few days before the public town meeting, but the agenda is not always complete, and sometimes the most interesting items are not included.

Q How many days before the public meeting [24] are they generally distributed?

A With respect to, for example, a Tuesday evening public Town Board meeting, sometimes if you were lucky you would get a notice on the Friday evening, in the Friday evening mail, sometimes Saturday, sometimes Monday.

Q And with respect to these issues that appear on the agenda, was there sufficient time for a civic association flyer to be prepared and mailed?

A In many cases there hasn't been time to prepare and properly address and by postage mail reach all the affected home owners.

Q Mr. Clark, do any civic associations within the township have the financial wherewithal to use the United States Postal Service and pay postage rates and mail flyers, assuming they had the time?

A Yes; there are a few. There is one outstanding example.

Q Can you tell us what areas they are in and what is their socio-economic standing, if you can use that criterion?

A Yes. The only instance of which I am aware—and I can think of no one more conversant with the facts—is

in what is known as the Greenville-Edgemont * * *.
[26] Now, Mr. Clark, can you tell us in terms of these hand distributions to which you refer, who makes these hand distributions, the people who make them? Can you tell us briefly?

A The people who are active in the affairs of the civic association, of which I am only one representative, themselves go from door to door and insert these civic community notices in the private mailboxes of the home owners.

Q To your knowledge are any of these people ever paid?

A No adult to my knowledge has ever asked for or received any compensation for this activity, but youngsters in the community, by their parents and sometimes possibly from the civic association, would be given fifty cents or a dollar or so, a little family stipend, for going down one side of the street while the parent is working the other side of the street.

Q When is it customary for these distributions to be made, in terms of time?

A The best time, if you can possibly do it, is to get the notices from door to door on a Saturday [27] or Sunday, when families are home, when people are not working, so they have an opportunity to see the notice, if necessary to arrange for a babysitter and to attend the public meeting or public event which affects them, which is usually scheduled to occur during the ensuing week.

Q Now, are distributions made during the week or on weekends? I think you have answered that.

A Almost always over the weekend, for the purpose of reaching the residents.

Q Is there any other reason?

A Yes: because all this work is being done by people who work for a living, whether they manage families or commute to a place of business. There is virtually nobody else to undertake the distribution, except in the evening, when it is dark, which is not a feasible way,

unless it is a great emergency, but over the weekend is the time when the unpaid people are not working or can leave their children with another member of the family and thus can go from door to door.

Q Now, Mr. Clark, during the course of civic association meetings were discussions ever had as to the procedures to be followed in distributing flyers so as to obtain community response?

[28] A Yes. There were discussions.

Q Can you tell us in summary form what the consensus was with respect to the most appropriate method?

MS. DALY: Objection, your Honor.

THE COURT: Yes.

Q Do you have an opinion, Mr. Clark, based on recent discussions, as to what is the most effective method in terms of obtaining community response?

MS. DALY: Objection.

THE COURT: He can answer.

A Yes. The only practical, effective way is door-to-door mailbox distribution of civic notices of non-commercial nature to reach people.

THE COURT: I can readily see considerable logic in the contention that the only effective and practical way of getting these messages to the home owners or residents is by hand delivery, but I don't know that you have established that the only practical way of such delivery is hand delivery to a postal box.

* * * * *

[31] Q Now, Mr. Clark, during the course of your personally depositing any civic or political flyers in mailboxes, did you ever cause any of these mailboxes to overflow, physically?

A No, and I never found one so full that a civic notice could not in good taste be inserted in that mailbox.

Q Could you tell us generally what a civic notice consists of, physically?

A In almost all cases it is one sheet of paper, perhaps letter sized, perhaps legal sized. Sometimes it have

a message on both sides, but it is almost invariably one physical piece of paper.

Q And when you insert it in this mail receptacle, how, physically, is it put in?

A First, you neatly fold the notice, usually with a three fold, and then you open the top of the mail receptacle and you put the notice neatly in with the materials which are already there.

Q Would that be the size of a No. 10 envelope, [32] business envelope, or would it be bigger or smaller?

A Yes—it wouldn't be bigger. That's an accurate description.

Q Now, can you tell us, other than civic associations, for what entities have you deposited or made such deposits? We don't need the names of them, just their general category.

A For the town government as an appointive official of the town administrator for our neighborhood sewer district, sewer notices were distributed containing information in great detail to every affected home owner.

Q Just the category, Mr. Clark.

A For the high school scholarship fund, for general election contests, for primary elections, for school board budgetary proposals, for school board bond issues, for non-partisan school election trusteeship candidacies.

* * * * *

[34] Q Mr. Clark, during the course of your civic distributions, do you distribute only to the home owners who have paid the annual dues?

A No. Everybody who resides in a civic association area is a constituent, and everybody therefore is entitled to every courtesy of notice and information about important governmental developments.

Q Mr. Clark, during the course of civic meetings that you have attended, have you ever discussed on any

occasions what was the appropriate or practical means of delivery of civic flyers with civic people?

A Yes; I have.

Q And can you tell me what the consensus was at these discussions?

MS. DALY: Objection, your Honor.

THE COURT: Sustained.

Q Based upon these meetings and participations, do you have an opinion as to what the consensus of the community is in terms of the most effective way to distribute civic flyers?

[35] A I do have such an opinion.

Q And can you tell us what it was—or what it is? I am sorry.

A My opinion is that no civic group had found an effective practical alternative to inserting notices of civic interest without postage in the mailbox of their private residences.

Q And do you have an opinion as to whether or not it is feasible to deposit these flyers or civic materials on the steps or the stoop or under the mat of the particular residence?

A I do have an opinion.

Q And can you tell us what that is?

A My opinion is that it is not effective, because we have weather, and it rains and it snows, and the wind blows, and that communication cannot be assured of being received.

More than that, you are an unpaid servant of this community in which you are distributing. You have a delicate relationship with each home owner. Those areas, whether they be of high or modest socio-economic status, those homes are proudly and beautifully maintained. You do not, if you have a message of concern and importance to that home owner, you do not [36] offend him by littering his property. You don't throw thing about. You want your message to be received sympathetically. You know where he want to receive it; where he expects to re-

ceive it and where you have been told in the past he was glad to have your notice, and he did go to the town meeting and so forth.

So that is why you do not offend, you do not alienate, you do not look down on people. You serve them in the mailbox.

Q Mr. Clark, do you have an opinion as to whether sliding such materials under the door is an effective alternative or a practical alternative?

A I have an opinion, sir.

Q Will you tell us what that is and what it is based upon?

A It is based upon the unanimous experience conveyed to me by others and my direct, personal knowledge throughout the past 23 years I was in Greenburgh doing this.

Stormdoors are weather-stripped, were weather-stripped long before the energy shortage. You can't slide a notice under most doors, and if you do slide a notice under a rare door, if you find one, you could get one through by this means, that th housewife [37] or the parent coming in through the front door with an armful of groceries and packages has to bend over on the front step, drop their groceries to pick up the notice.

That is not the way you treat people, even if you could in the rare instance of one out of a hundred, you cannot sneak it under the door. You don't cause that trouble.

THE COURT: You mentioned storm doors, and that raises an obviously more practical alternative. You don't try to slide it under anything. You open the storm door, which is not locked, and put in in the space between the storm door and the main door.

THE WITNESS: Your Honor, that is a sage observation, but most people button the storm door, so it is not always easy to get in that way, and if the storm door is unlatched so you can do that, it means you are putting it down there, and every time anybody rings the bell and goes in, your message may not be received.

The newsboy comes by to collect, or the wind will pick it up and gust it out of the threshold, as it were, so you can't be sure that it will safely reach the person who will read it.

[38] THE COURT: Do you think people would be offended if you used small pieces of Scotch tape and stuck it onto the front door or storm door?

THE WITNESS: Your Honor, I think in many areas it would be alienating and offensive. I have never seen it done. If I used Scotch tape in my neighborhood, I predict there might be great resentment, and the meeting might be over before you got through.

THE COURT: I am talking about a single strip of Scotch tape, which could be pulled off without leaving a mark.

THE WITNESS: When you do that, your Honor, you are advertising, "Come burglarize my house." It is an announcement that no one is home. It's a conspicuous sign, "Hit my house and clean it out."

Burglaries in Suburbia are a real—

THE COURT: Well, there might be people at home, and you don't bother them by ringing the doorbell and bringing them from a hot shower. You just Scotch-tape the message on the door and go away. That won't take an inordinate amount of time.

Maybe you offend people—I don't know. That's what I am asking you. But so far as taking time is concerned, it wouldn't take much time.

* * * * *

[40] I am familiar, let me say, with the Town of Greenburgh, having lived there 10 years longer than you, but I am not using my expertise with respect to methods of distribution of messages.

Q Mr. Clark, we need your opinion as to whether this would be affected by the weather or not, and, if so, in what way.

A I must say that wind, snow and rain, to my mind, in my opinion, based upon my experience, makes this not a practical nor a viable means of being able to communicate with the affected home owner.

Q Now, Mr. Clark, do you have an opinion as whether or not there is a practical alternative to the mailbox deposit in terms of sticking it in between the door jamb and the doorknob or attaching it to the dooknob in some fashion?

Can you tell us, do you have an opinion, and what is it?

A I do have an opinion, and in my judgment and experience those are not practical, effective alternatives.

Scotch-taping it to the doorknob means it will fly, like an Irish pennant in the hail, wind and [41] sleet.

THE COURT: He didn't mention Scotch tape. He means rolling it up and sticking it in the space between the doorknob and the doorjamb.

THE WITNESS: Yes, your Honor. The problem is that in that fashion it is not secure. It can be blown around. Anybody coming along who is not a dweller in that residence can disturb it. It may fall out or be torn. There is danger of the word not getting to the family that you are trying to communicate with.

Q Mr. Clark, based upon this experience and what you have just testified to as to the alternatives, do you have an opinion as to what would be the effect on the civic associations in the Town of Greenburgh if they were denied the ability or the right, so to speak, to hand-deposit without postage?

A I do have an opinion.

Q And what is that?

A And I feel that denial of this mode of communication to them would largely destroy their reason for ex-

istence and make it impossible as a practical matter for them to serve their constituency.

They don't have the money; they don't have [42] the resources to communicate practically through other modes of communication.

Q Now, Mr. Clark, did you ever hand-deliver to somebody personally in terms of your flyering or leafletting over the course of your civic experience?

A I have, or I have offered to.

Q And can you tell me: is this an effective alternative to the deposit in the mail receptacle without postage? Do you have an opinion as to whether it is?

A I have an opinion, and my opinion is that in perhaps one case out of a hundred it is an effective alternative, because there is someone there whom you can personally hand-deliver the object to.

This is statistically a very small number of instances, however, and where the person you are addressing is up on top of a ladder or painting his house or fixing screens, as may be the case, you do not climb up the ladder or, as his Honor was saying, ask them to interrupt some important work.

You say, instead, "I have a notice. There is a school election coming up next Tuesday. Please turn out and participate. * * *

* * * * *

[44] Q Mr. Clark, based upon our experience in the Town of Greenburgh as a home owner—and, by the way, where are these mailboxes in Secor Woods physically located?

A Originally they were like a Rural Free Delivery box, out at the curb, on a post, with the traditional U.S. mailbox with the red flag, and you walked down the street and put them in.

After some years this neighborhood was changed by the Post Office, and they allowed us to put our mailboxes on our private residences, usually attached to the front door. So you would put it in the mailboxes there.

Q Now, based on your civic experience and work throughout the community, are all the mailboxes in the town located on the front door of the residence?

A No. In a lot of cases—the Longview area is one; the Saw Mill is one—some of the nicest areas have mailboxes at the curb, on a little post, the RFD type of boxes.

Q By the way, Mr. Clark, do you know who owns the mailboxes?

A I paid for mine. Everybody I know of paid for theirs, private property, * * *.

* * * * *

[61] THE COURT: All right. More circuses. But everybody is completing the record for the Court of Appeals.

MR. HAMMER: I assume that means our offer of proof is thereby denied.

THE COURT: I don't know what could be more clear.

BY MR. HAMMER:

Q Mr. Clark, based upon your knowledge of the community, the way in which homes are maintained and your civic activities over the years, do you have an opinion as to whether or not it is feasible to place a separate receptacle on a person's home to receive civic flyers in addition to the U.S. mail receptacle? Do you have an opinion?

A I do have an opinion.

Q And what is your opinion?

A My opinion is that this is private property, and there is no way in which you can force a home owner [62] at his expense to go out and buy a second mailbox solely to receive non-commercial civic notices when he already expects to and wants to and has given permission to the civic group to use his existing, privately purchased, privately owned mail receptacle.

People don't want two mailboxes on their front stoop, and civic associations, which have the modest means which are tabulated in our little survey, can't go out and buy second mailboxes for 500 families, when they have a treasury of maybe two hundred dollars.

Q And are there any facilities in the Town of Greenburgh that are not private property?

A Oh Yes. In our own Secor Woods neighborhood, there is one of the low-density, scatter housing projects, which is publicly owned, funded and managed property, and I don't know how we could insert second civic mailboxes on that, because that involved federal and town and state sovereignties in our own immediate neighborhood.

MR. HAMMER: I have no further questions of Mr. Clark.

THE COURT: All right. We will take our morning break of 10 minutes.

(Recess)

* * * * *

ALFRED A. DELLI BOVI

DIRECT EXAMINATION

* * * * *

[76] Q Are there any apartment houses?

A And a number of 40 and above family apartment dwellings.

Q How big would these apartment dwellings be? Five or six stories or more?

A They would range from four stories to—one is 22 stories.

Q Have you been involved in civic, community and political activity outside of your own particular Assembly district in Queens County?

A Yes; I have.

Q And have you run for office in the past?

A Yes; I have.

Q And can you tell us what generally the socio-economic levels of this community are?

A The district that I represented had some very poor areas eligible for almost all types of federal aid in the South Jamaica community and some very wealthy areas. It ran the entire gamut.

* * * * *

[78] A You take the item, depending on how it is produced, you know, and you fold it or get it in some condition so that you can insert it into the mail slot or mail box.

Q What size would it be after you fold it?

A Well, generally it ends up looking like a letter. Generally, it is something run on a eight and a half by eleven sheet, generally mimeographed or multi-graphed. Generally it ends up the size of an envelope.

Q And what do you do with it? Where do you put it?

A You attempt to put it in a place where it is going to come to the attention of the home owner, which invariably, if there is a mailbox that you can get into, that's the best place, I find, to insert it.

Q And when you put it in there, does it have postage on it?

A No.

Q And when you distribute for civic associations, do you cover only those in the association who pay dues or do you cover others?

A No. You would cover generally people in a specific area whom you want to reach, regardless of [79] whether they pay dues. Dues paying in civic associations is not generally a criterion to decide who is going to get the information. The dues payers probably keep the organization growing—going, but when an issue emerges everybody is involved, and everybody is invited to participate in meetings and whatever.

Q And can you tell us in a general category what the general issues are with which these associations are confronted?

A Well, I can recall in my own community issues over the curtailment of some municipal services, as a regular thing. Anything that is perceived as a threat to the neighborhood.

When changes in schooling or zoning patterns have been proposed, meetings have been called.

In 1975 I can recall a meeting held to protest the proposed closing of a firehouse during the budget crisis.

THE COURT: I believe all our attorneys are here in the criminal matter, so we will break and come back at 2:00 o'clock.

I am sorry to have this interruption.

(Luncheon recess)

* * * * *

[81] Q Do you have any knowledge as to the approximate percentage of home owners that pay dues to their local group, whether it is 10 percent or 90 percent?

A I would say it is closer to 10 percent, from my experience in hearing financial reports.

I have listened to a number of them at the meetings, to say it is closer to 10 percent than 90 percent. Maybe 15 percent if they are lucky.

What happens is that if there is a big issue, a big hoot and a holler and a threat to the community, a lot of people run to the civic association, join and pay dues at that time and then drop off.

Most of them are lucky if they have 50 people at a meeting, and if they get 200 members they are lucky.

Q Do you have any knowledge as to the cost [82] of mailings through the U.S. Postal Service?

A Yes.

First class is 15 cents per communication. If a group has a bulk permit, it's 8.4 or 8.6, something like that,

and it may be that they could apply for a non-profit organization mailing permit, which is 3.7, about to go to 4.1 on July 1st. But I don't know of any civic group that has attained non-profit status in my area. It may be in another area.

Q Are there any other costs of mailing?

A Well, printing and addressing.

THE COURT: Well, that's the same if it is going to be mailed or hand-delivered.

THE WITNESS: No; it isn't. If it is hand-delivered and a general distribution, it goes into everybody's mailbox or slot or tree, wherever you put it. You don't have to put the addressee's name on it.

THE COURT: Well, the printing is going to be the same whether it is hand-delivered or mailed.

THE WITNESS: No. Printing, you have to design an envelope and print it.

THE COURT: I am talking about the notice itself.

THE WITNESS: Even if you have the notice [83] itself, a self-mailer, as it is called in the trade, you have to get it addressed, and it's done manually or by labels. The printing is an extra cost.

THE COURT: But the printing cost is the same whether you mail it or deliver it by hand?

THE WITNESS: Yes.

Q Have you been in touch with people in the community over the years in terms of their knowledge regarding receipt of civic flyers, in terms of your community activities?

A Yes.

Q And do you have an opinion, with a reasonable degree of certainty, as to whether they expect to receive civic and political flyers?

MS. DALY: Objection, your Honor. I don't believe a foundation has been laid.

THE COURT: Read the question.

(Question read)

THE COURT: I will permit it. I suppose they would expect to receive them where they received them in the past.

A My opinion is that they would expect to received them in their mail slot or box.

THE COURT: If we are talking about a slot, [84] there is nothing against the law in putting a piece of literature or an announcement or whatever through a slot in the front door.

THE WITNESS: My opinion is wherever they would get their mail is where they would expect to find a civic notice.

THE COURT: All right.

Q Now, have you ever received any complaints from any of your constituents, either political or civic constituents, regarding mail being deposited without postage in the place where they receive mail at home?

A No.

Q Have you ever received complaints from your political or civic constituents as to any type of delivery?

A I have during the course of my political campaigns received complaints when people, whoever we had giving out the material, would leave it in the tree, under the doorstep, under the mat or somplace where it would blow away or create a litter situation.

THE COURT: What do you mean, in the tree?

THE WITNESS: Well, the custom in Queens campaigns is to hire young people to give out the literature, and some of them will leave it in a bush, on a fence post off the property, that kind of thing.

[85] Those complaints I have received many times, because the communication becomes wet if it rains or blows away and ceases to become a communication.

Q What happens when it is left under the mat or on the front steps?

A I have had experiences in apartment houses and also residential houses where people will complain if you

leave the thing outside the door, that it's a signal to would-be crooks and so-and-so isn't home, and it's an accumulation of undelivered items and a signal that people aren't home.

By the way, the police department regularly tells me, you know, "Make sure if you are going to be away, make sure there isn't an accumulation of that stuff." It's a safety factor.

Q Have you considered attaching it to the doorknob?

A Yes.

Q Under what circumstances have you done that and what results have you had?

A In apartment houses I have attempted to slide things under the door. That hasn't proven successful, particularly since people have become energy conscious. [86] They have weather stripping, and you can't slide it under the door as much as you used to when oil was much cheaper.

In terms of affixing it, in political campaigns and in my legislative work we developed—we purchased sets of two items. One was a plastic bag, an envelope with a hole cut in it that went around the doorknob, and we were able to purchase them and you could insert the thing in there and hang it.

THE COURT: What do they cost?

THE WITNESS: The cost was nominal. You could get 10 of them for a penny. The problem is, they are also not very functional, because it requires a physical knob that you can get around, and most homes in my community, the private homes often have those handles, and you can't affix it to that type of item.

Also, I have been active in civic and community affairs for almost 20 years. I only found out about these because somebody happens to manufacture them in my district, and they came to me when I was running. They said, "We make this item." It's not a widely known item, and we found it very impractical.

Q Has it ever been used by civic associations?

A Not to my knowledge.

[87] Q Have you ever received complaints from constituents about those things hanging on the door?

A Well, the second was a cardboard—

MS. DALY: Objection.

THE COURT: Did you have complaints from home owners concerning the use of the plastic bag?

THE WITNESS: On the doorknobs where they fit, which again was apartment houses, where we were able to use them, we received complaints that it was a signal that they weren't home, and somebody would come in and rip them off. It was a signal to every junkie in the neighborhood.

Q And you testified you could not use them in private homes?

A Very difficult.

Q And I believe you indicated there was another alternative about putting things on doorknobs?

A Yes. That's what is known in political campaigns as a doorknob hanger. Usually it's on cardboard stock. It's heavy, cut in such a way that it will go around the doorknobs. It works on doorknobs, 95 percent of them.

Q Can it be used by civic associations?

A The problem with it is that it has to be [88] ordered a long time in advance, generally. It's not something you can turn out overnight. It's usually limited in size.

Q What size would it be?

A The only size I have seen would be about the size of an envelope, in total.

Q And what is their cost?

A They run about a penny and a half to two cents apiece when you are ordering in quantities over 25,000. Under 25,000 you can't—it's very rare that a printer—it has to be a die-cut thing. It's a specialized item.

Q So you have used them in your political campaigns?

A Yes.

Q Exclusively?

A By that I mean I have never used them in a non-political sense.

Q Are they practical for civic associations to utilize?

A No.

Q From a time point of view?

A Well, there's lead time to get them, and the lead time is two or three weeks, at best.

* * * * *

[90] A The general complaint is that something left at or around the door of the apartment, that is, is an invitation, is a suggestion to anybody passing by that this particular family isn't at home, and it's an invitation to burglars.

The alternative, which is leaving the stuff in the lobby, which we have tried, creates problems with the superintendent and everybody else in the building that you're hitting, leaving a stack of things down by the doorbells, whatever.

Q When you have left things in the lobby or mail room, whatever is appropriate, have you ever had occasion to check back and ascertain the success of your delivery?

A It's an absolute disaster. As soon as the superintendent comes, he picks it up and throws it away. He says, "Your're littering."

It gets knocked over—

MS. DALY: Your Honor, the question is, did he go back.

THE WITNESS: We got complaints from our workers who live in the buildings, saying, "Why are you putting the stuff, littering down there?"

[91] We got complaints from building superintendents, and on occasion we did go back and we found that they were removed by the superintendent.

Q Now, Mr. delli Bovi, in the years in which you have been distributing in mailboxes without postage, have you ever filled up a box to its capacity?

A Not on one day.

THE COURT: Well, I assume the mailbox gets emptied from time to time by the occupant, except in the case of extended vacations.

Q Let's take one particular delivery.

Have you ever filled it up to capacity?

A No.

Q And would you say the times you delivered in your personal experience, is there other mail in the box or regular mail in the box?

A Yes.

Q And have you ever disturbed that other mail, ever had occasion to?

A No. Sometimes we even insert it further in the box, you know, if it's hanging out.

Q You mean, the regular mail is hanging out?

A Yes. If you put another piece in and something is hanging out, you put it to where it belongs.

* * * * *

[94] Q And based upon your experience, do you have an opinion as to whether the types of funds that are available to political candidates are also available to civic associations?

A My experience has been that the political candidates are able to raise funds for mailing a lot more readily than a civic organization.

I can only say that when you design a political campaign you automatically build in a certain amount of certain components for direct mail. You might supplement that with other ways of getting your message across.

Q And do any of those components or structures exist with respect to the civic organizations in your area?

A Not to my knowledge.

Q Now, in your opinion, based upon your civic and political experience, do you find that the civic association is an essential part of the political process?

[95] A Yes, a very essential part.

Q And do you have an opinion as to what would be the effect on local civic groups in your district of they were required to desist from depositing in home owner mailboxes without postage?

A They would not be able to get their message out of their constituency. They wouldn't be able to arrange demonstrations, meetings, rallies, whatever they were doing at that particular time. They wouldn't be able to fight their battles.

Q And is there an alternative? Could they raise the dues in order to accrew enough money to use the Postal Service?

A I don't believe so, and I want to make it clear, when you asked if they have a regular mailing, they may mail to members if you pay your five dollars dues you will get it in the mail, but in terms of reaching the whole community, can they raise the money—I would say no, and they don't generally have the time. Time is a very important element in these civic battles.

[96] Q Do you have an opinion, with a reasonable degree of certainty, as to whether hand deposit in homeowner mail receptacles is essential for political campaigns and canvasses, based upon your experience?

A Yes. I would have a definite opinion. I would say it is an absolutely essential item in this day and age.

Q You stated previously that there is a percentage of people who pay dues from time to time, that it varies depending on the issues. Do civic associations make an effort to solicit new dues-paying members?

A Yes. They are generally looking for members, and I am sure they always ask, "Bring a friend to our meetings. Try and join up."—and so forth. But basically their recruiting drive comes when an issue is hot.

Q And generally how do they recruit new people?

A Well, let's suppose there was an issue arising in a particular community, maybe a school issue or a zoning issue. A protest meeting might be called, or a meeting on the subject to illuminate, to bring the issue to life might be called in a local school or public meeting hall, and at one point during the meeting while everyone was aroused on this particular cause, someone, probably the membership chairman, would get up and say, "You should join our civic association. That's why we are here. We need members." [97] That kind of pitch.

Q Could they at any time use hand-distributed fliers to ask new members to join a civic association?

A Yes. If they had a newsletter or something, they might say, "Join up." They might have to tear off a coupon.

Q Based on your experience, do you have an opinion as to whether civic groups have a practical alternative to depositing mail in mailboxes without postage?

A I don't believe that they do.

Q Mr. delli Bovi, I show you Plaintiffs' Exhibits 7, 8, 9, and 10. Can you identify these? Do you recognize them? Just look at them.

A Yes.

Q And can you tell us what they are?

A Number 7 is a newsletter—

Q No. Are these typical of the kinds of things that have been delivered by hand without postage into mailboxes in your area?

THE WITNESS: They are; yes, they are.

MR. HAMMER: I offer them in evidence, your Honor.

MS. DALY: No objection, your Honor.

(Plaintiffs' Exhibits 7, 8, 9, and 10 for identification were received in evidence.)

* * * * *

CHARLES ALAN BERNSTEIN

DIRECT EXAMINATION

* * * * *

[103] A Well, my job title is community organizer.

Q What do you do?

A I pull together and develop civic associates in the City of Stamford.

Q And can you tell us what are the socio-economic areas in which you engage in these activities? I assume it in the City of Stamford.

A Blue collar neighborhoods, homeowner and tenants.

Q That is multiple dwellings?

A Right. Multiple dwellings.

Q And will you tell us briefly what are the logistics of the way you go about organizing a civic group?

A After some preliminary research of the neighborhood, we go in and do a door-knocking drive, where we simply make an effort to talk to everybody in the neighborhood. We also touch bases with clergymen in the area, people involved in politics, people involved in labor organizations.

Q And after you organize an association, what is your function?

A To staff those organizations, to give them technical assistance, to keep people in contact with one another. I guess basically I spend a lot of time on the telephone.

* * * * *

[105] Q And during the course of your work for these groups, have you ever distributed fliers of any nature whatsoever?

A Yes. After a door-knocking drive, sometimes even before the drive, to announce that we are going to be knocking on doors, we set up meetings, and to announce these meetings we flier the neighborhood, and whenever a special event comes up, the neighborhoods are fliered.

Q How do you do that?

A We have tried a number of things: mailboxes, inside screen doors, knocking on the doors, and handing

them to people, rolling them up and putting them next to the doorknob, that kind of thing.

Q Let's take one at a time. Have you tried putting them on the stoops or on the mats?

A I have never put them on the doormat. That's a good place for them to get stepped on.

Q Have you tried putting them in the storm door or behind the storm door?

A Yes. I have done that frequently.

Q And what have been the results in that respect?

A It's a risky way to deliver them, just because they can blow away. If they are put in firmly, when the person opens the door, it can be blown away. Children run away [106] with them.

I have had the experience of putting them behind every door on a street, and one of the kids found it and began to follow me and take every one out.

Q How about attaching them to doorknobs?

A Well, you can roll them up and stick them in the space between the knob and the frame. When you do that, you're okay, if the person is at home, if the person looks. If the person comes home and opens the front door, it falls on the ground.

Attaching them with Scotch tape I haven't experimented with, because I think it would be creating a nuisance for people to have Scotch tape to scrape off, and it would be an unnecessary expense and effort.

Another problem is that the flier can get ruined by rain, and Scotch tape can be pulled off by the wind.

Q Have you considered any of the time factors involved in any of these methods of delivery?

A I would say that Scotch taping them to a door would be a fairly slow, tedious process. I like to run with fliers, and that would slow down that process.

As far as putting them in mailboxes, that involves folding and stuffing it in the box. It's a matter of folding as I walk, and that's not a problem.

[107] Sticking them in the storm door takes about the same amount of time as putting them in the mailbox, not faster or slower.

Q Have you ever used the bulk mail rate that the United States Postal Service affords?

A Fairly frequently. We had a bulk permit in Norwalk, and when we got down to Stamford, we opened up an account, and this has been very helpful.

Q Can you tell us what your experience is in using the bulk mail rate in terms of the neighborhood associations to which you refer?

A I have never used bulk mail for that purpose, because it is impractical. We use it for a number of our purposes for which it is very efficient.

Q Such as—

A Any time of distribution of flier that has to go out to a constituency, to a group of people not defined by a geographical area. It would be ridiculous to drive to one address on one street, to another address on another street, for a thousand notices, and instead we just drop it in the mail.

Q And why is that not practical for the neighborhood associations, the four groups you hoped to form?

A Could you ask the question again?

[108] Q The bulk mail rate: Why is it not practical for the neighborhood groups that are in a confined geographical area?

A It's not practical. First of all, there is labeling, which takes about two hours. Labeling, folding, envelope stuffing, depending on what is preferred, getting them down to the post office and going through the procedure down there. It's a lot faster to run off the fliers, not bother addressing them, and dropping off the copies.

Q Are any of the meetings you are involved with in these neighborhood associates on an emergency basis?

A Occasionally.

Q And can you tell us what happens with respect to these emergency meetings?

A Pretty much standard procedure that if there is a called meeting of the neighborhood association, the leader of the group, the president or chair person, whatever the designation is, fixes the time for the meeting and the place, makes that decision, and it becomes my job to produce some fliers and make sure they get out as quickly as possible.

Q And do you have sufficient time to use first-class or bulk mail?

A No, not generally. That involves trips to the copy centers to get mailing lists run off. If it's the [109] nighttime, you have to wait for the next day. If it's the weekend, you have to wait for the next Monday. On the weekend, the post office isn't open.

The quickest way is to print the fliers and distribute them.

Q Do the civic groups have the resources for mailing, either first-class or bulk mail?

A No; they don't. They do occasionally collect donations for specific purposes, but that is an important expense, and when they know there is no money to pay for these things to get mailed, they contact one of the neighbors or contact me. It's a much creaper and faster process.

Q What do the treasuries run?

A The individual associations do not have formal dues. The Stamford group has a membership fee of ten dollars per family per year—five dollars to people on fixed incomes.

Q What about the homeowner groups themselves? You are a group which assists the homeowners.

A They only do fund-raising if they are putting in a zoning application. There's a $100 charge. They will knock on doors and somehow get that hundred dollars together. That's an expense that they can afford.

Q But do they have the funds for mailing, at any rate?

[110] A No; they don't.

Q Now, have you attempted to deliver in multi-family structures?

A Yes.

Q How have you gone about doing that, physically? Do you put it under the door?

A It's the same procedure: putting them into the mailboxes. Sometimes there are mail slots, and in that case they go into the slots, or slide them under the door, whatever is available.

Mailboxes are easier, because they are in the lobby.

Q So you have to get into the building, beyond the lobby?

A Yes. For buildings that have street access, there are mailboxes in the hallway and other types of mail receptacles. I'm thinking of Oak Park. There's no lobby. Each unit has its own front door slot.

Q Have you ever received any complaints about deposits in the mailboxes by hand?

A No.

Q Have you ever received complaints about any of the alternative methods that you have testified you have tried on occasions?

A I think that the one complaint that does come up [111] with some regularity is that people just never saw the flier. If it hasn't been put in the mailbox, there is a tendency for it to be blown away, picked up by children, or thrown away.

Q And you have received complaints from people with respect to the meetings?

A Yes. As a matter of fact, there is one family, Bernie and Molly Dumbrowski, came to a meeting one time. The Association has been around for nine months, and I always telephoned to see if they had gotten the notice. "No, didn't get it, but I'm glad you called, and I'll be there."

And one time they said, "At last we got a flier." I put it in the mailboxes.

Q Is telephoning all the families a feasible alternative?

A It isn't an alternative. It's kind of a numbers game. If you telephone the neighborhood, you will get a certain percentage to a central meeting. Then, there's only a certain amount of people who will come, based on a phone call. Couple that together with a notice, and the return is much higher. Couple that with persons knocking on doors and talking to people, and it is still higher.

Q By the way, Mr. Bernstein, is this your full-time employment?

A Yes.

* * * * *

[113] Q Was this the publicly-assisted tenants?

A Yes. The Housing Authority is the body that administers, the administrative body.

Q Without going too much into the issue, just tell us in a sentence or two whether it was an emergency or why on each of the exhibits—

A All right. In this case it was an emergency, simply that we notified the people, to give them extra notice that they should be at the meeting. I believe that the people had been notified once that that would be coming up. We wanted to make sure that nobody had forgotten and what the plan was, among other things, "Let's get a flier to everybody's house the day of the meeting, so when they walk into their house they will get the notice."

Second of all, Exhibit 12, East Side Action Group. "Area safety alert. Important meeting."

Now, this meeting had been planned several weeks in advance. The reason that they had to wait until the minute, the last minute, to get this out is that this box here—I guess you all can see it—inside the box it says, "Wednesday night meeting with the Police Chief." And there is some name.

Now, two of these people did not confirm that they [114] were coming until a lot of people gave them phone calls and demanded that they come, and it wasn't until Friday evening that people knew they were coming. In fact, this had to be Xeroxed, because we didn't have time to get it mimeographed, because the mimeograph place shut down on Friday afternoon.

Q It was done over the weekend?

A It couldn't have been done any earlier, because we didn't know what was going to be that day.

The results of the meeting was that the safety hazard signs were put up all over the—

THE COURT: I don't think that is necessary. The point is that a number of these had to be sent out on an emergency basis.

THE WITNESS: And No. 18, "Oak Park Emergency Meeting." And then things were breaking fast on one of those issues, and what this is is an update of what happened in the past few days, that the president decided to call the meeting, and that's what happened.

Q The other exhibits that you had there: Were those hand-distributed in mailboxes as well?

A Yes.

Q And when these are deposited, how would they physically be put in? Do you fold them?

A This is too large to go into a mailbox. What I [115] would do is fold it down through the middle, this way, and it goes in a mailbox.

MS. DALY: What number is that?

THE WITNESS: Number 11. The larger ones would take two folds.

Q So they would all be the size of a business envelope?

A They would be the biggest. It would have to go in this way.

Q Did you ever have any problems in distributing those, in terms of overflowing the mailbox?

A No.

Q Did you ever tamper with any materials that were already in the mailbox?

A No. That would be an excellent way to lose a member from the neighborhood association.

MS. DALY: I move to strike that, your Honor, as not responsive to the question.

THE COURT: Yes. It will be stricken.

Q Now, Mr. Bernstein, can you tell us what would be the effect on civic associations, in your opinion, if you have an opinion, if they did not have the option or right, so to speak, to deposit materials in the homeowners' mailboxes? What would be the effect on these distributions? [116] A It would be disastrous.

Q In what way? What would happen, not the subjective comment.

A A lot of homes wouldn't receive fliers, is the main result of that. A number of houses—well, if there's a storm door on a house—let's talk about architecture here for a minute. If there is a storm door and it's locked, there is no place where you can slip a flier into the door. There is no way you can wrap it around the door, because the storm door knobs are just a knob, where no jamb is next to it.

Q What would be the effect on the communications of the four associations that you helped establish?

A There simply wouldn't be as much communication.

Q Do any of these associations pay either you or your organization for your efforts?

A A number of individuals in the associations are subscribing members to the Connecticut Citizen Action Group. However, we are not payrolled. Some of them are funded by the Citizen Action Group.

THE COURT: How is that group funded?

THE WITNESS: One way is by door-to-door contribution, and the other largest form of income is that we

have the largest list of volunteers in Connecticut, which are part [117] of the Action agency.

Other sources of funding are their small grants. We have some CETA workers. I think our CETA workers are four throughout the state.

Q Do you have a budget for mailing to these four homeowner associations?

A No. We have money budgeted for bulk mailing, but it isn't considered part of the bulk mailing budget.

Q I am talking about these four associations.

A No.

MR. HAMMER: May I have one moment, your Honor?

THE COURT: Yes.

(Pause.)

Q Can you tell us, Mr. Bernstein, based upon your experience in this community, do you have an opinion as to where people expect to receive these materials in these four associations? Let's limit my question to where they expect to receive their civic notices.

A In their mailboxes.

MR. HAMMER: Your Honor, I would like to offer those exhibits which are marked for identification in evidence.

MS. DALY: No objection, your Honor.

THE COURT: They will be received.

(Plaintiffs Exhibits 11 through 19 for identification)

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EDMUND H. MULLINS

DIRECT EXAMINATION

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[123] Q And will you describe your present duties and responsibilities?

A Up until about one month ago I worked on strictly internal assignments for the Postal Inspector Service. I

went a little over a year at Westbury, in charge of Queens, and Nassau and Suffolk.

I spent three and a half years at Kennedy Airport, and I spent 18 months in Queens County, and prior to that I spent a year at Westbury and New York City, all doing internal theft work.

Q Are you familiar, in connection with your employment, with Section 1725, which is the subject matter of this lawsuit?

A Yes; I am.

Q Will you please explain to the Court, from the prospective of a postal inspector working on internal thefts, what role, if any, Section 1725 plays with respect to internal mail theft?

A It relates to internal mail theft, in that under the provision of the law the only people in the chain of mail [124] is the people in the Postal Service, plus the postal patron, and we conduct our internal theft investigations accordingly.

THE COURT: When you say "internal theft," you mean theft by postal employees?

THE WITNESS: Yes, your Honor.

Q Will you explain to the Court what investigatory steps you would take if based upon a customer's complaint you had reason to believe that there was a possibility of a carrier in a particular post office stealing mail?

A After I had received customer complaints that indicated a problem with a particular post office, I would assemble all of the complaints on that particular office. Those complaints might be in the form of letters written to the post office or Inspection Service, notes which I would have of telephone complaints to the office or tracer forms submitted by patrons that lost mail in the post office.

Once I had assembled all of these complaints, I would analyze the complaints to determine what particular route, what area within the post office these complaints

had relation to. Once I had determined the area that they had relation to, I would do what we refer to as an access charting of the employees within that office to determine which employees had the most access to those pieces of mail that were lost.

[125] In order to do the access charting, I would have to go to the employees' time records to determine who worked on a particular day of the loss and the assignment sheet to determine if—who were the letter carriers working, the utility routes—that covers a route every day of the week, who is on vacation.

In a large office, where we would have a considerable number of complaints, it may be necesasry for me to utilize computerized time records and a computerized access chart of the employees.

Once I had determined by access charting of postal employees which employees in the post office had most access to the articles of mail complained of, I would begin with that employee and start my investigation into the actual loss of the materials.

Q Would you describe to the Court the procedures the Postal Service follows when a customer makes a complaint of missing mail?

A If the customer makes a complaint of mail being missing, we ask him to file a tracer form, Form 1510. This form can be filled out at any post office, or it can be called in to a post office, and the form would be filled out for them.

This form has such material as the name and address [126] of the addressee and the sender, the time of day, and the location the article was mailed and the contents of the article.

Q What happens next?

A The form itself, if it is filled out, for instance, by the office that originated the article, the form would then go to the office of destination, where they would determine whether, in fact, it had been received in that office. If it wasn't, the forms would be forwarded to the

Dead Letter Office at the mailing office and the destination office, where the people in the Dead Letter Office or the Dead Parcel Office, as the case may be, would make a search of the records in the Dead Letter Office or Dead Parcel Office to see if the contents of anything that had come into that office had anything to do with this particular complaint.

One part of the form goes back to the person trying to locate that particular piece of mail. One copy of the form goes to the Postal Inspector conducting internal theft investigations in the area that had originated the complaint and the area where the piece was addressed.

This entire process may take in the vicinity of 60 days before the complaint is in the hands of the Postal Inspector.

Q Would the receipt of the actual complaint after the [127] lapse of 60 days automatically trigger an investigation by the Postal Inspector?

A No. Depending on the size of the office and the amount of mail at that office, it would take several complaints of mail being lost at that office before we would initiate an investigation.

Also, the type of mail being lost would have an effect on the time of the initiation of the investigation.

Q So, in initiating an investigation you might, in fact, be reviewing complaints that may be as old as a year; is that correct?

A That's possible, from the time the first complaint would come into our office to the point where a pattern developed, where it developed that there was a thief in the office. We might very well be dealing with a series of complaints and forms stretching a year, at least.

Q What are the factors, if any, that contribute to a delay in the investigation of internal theft?

A Any tracer forms that come in that appear to warrant an investigation where we determine information is incomplete or inaccurate would require sending it back to the sender or addresser to verify the information on

their or get information that wasn't contained on the form.

Q Based upon your experience, what effect, if any, [128] would there be on the internal investigative methods you have just described if persons or entities other than the Postal Service customer or Postal Service employees had access to a letterbox?

A In my opinion, it would be devastating to the Internal Theft investigation efforts of the Inspection Service.

Q Will you explain the basis of your opinion?

A We would have a completely new class of individuals that have access to the mail that at present don't have access to the mail, and based on the elapsed time that we are working with, with complaints, now, I believe it would be almost impossible to determine and include these other people in the access charting to find out who was actually in the mailboxes and had access to this mail other than the Postal Service employees and the patrons.

THE COURT: But this wouldn't be true if the access to the mailboxes was only to insert things into the mailboxes and not to take things out of the mailboxes?

THE WITNESS: Your Honor, I don't think we could assume that all people with access to the mailboxes wouldn't take anything out of the mailboxes.

* * * * *

[138] Q Were there any others?

A That's the only one that I am aware of.

Q And the one in the Eastern District does not relate to a civic association?

A No.

Q What does it relate to?

A To an individual.

Q And was he acting for a civic association?

A I don't know.

Q Was there a fraud scheme involved?

A I believe it's only 1725.

Q Did he take anything out of the mailbox?

A I don't know.

Q So you don't know the facts of the indictment?

A I don't know that there was an indictment. There is an investigation.

Q You said it creates suspicion if anybody not in uniform goes up to the vicinity of a mailbox.

A Yes.

Q Where you live and in the area where you work, where are the mailboxes located?

A The areas that I cover have mailboxes anywhere from inside the apartment house to out on the road.

[139] Q Are there any attached to the houses, on the front door?

A In some areas, yes.

Q Is that a common thing?

A Yes.

Q And, to your knowledge, do people go to this area and solicit contributions for charitable purposes, from door to door?

A Yes.

Q Do they wear uniforms?

A Some do; some don't.

Q Let's take the ones who don't, people ringing the doorbells and being there perhaps five to ten minutes, waiting for the homeowner or discussing how much the contribution would be. Do you feel that this invokes a suspicion?

MS. DALY: Objection, your Honor. He testified about people coming up to mailboxes, not people ringing the doorbells.

THE COURT: Well, I think it could be relevant. They are in the vicinity of the mailboxes.

Q Do you think this creates suspicion?

A Soliciting from door to door, no.

Q Don't you think there are a hundred other reasons why a person could go up to the vicinity of a mailbox,

either [140] to put mail in or to take mail out, when it is attached to the front door?

A It relates to where the mailbox is.

Q That relates to the front door, if the mailbox is there. Would that create suspicion?

A Not necessarily in that particular situation.

Q How would anyone watching from the street know that he is there for some nefarious purpose, or if he is a neighbor next door or a Fuller Brush man.

A If he went into the mailbox and he was not a postman, I assume somebody watching from the street would take notice of it.

Q What about the meter reader that comes to your house and leave a card saying, "You were not at home. Please fill out and return the card and let us know when you will be at home," and puts it in the mailbox. Do you think that creates suspicion?

A I doubt it.

Q How would that person, who is not wearing a uniform—how does that create suspicion any more than a civic representative who opens a mailbox and puts a piece of paper in? How does one create suspicion and one does not?

A It all depends on who does the observing. Perhaps the one who sees the meter reader had just had the [141] meter reader at his house.

Q So you can't tell us which creates a suspicion as a general rule?

THE COURT: Well, under Section 1725 the use by the meter readers would be illegal and would be prevented if the section were rigorously enforced. So his point is valid if we assume that Section 1725 would be rigorously enforced.

Q Are you aware of the fact, Mr. Mullins, during World War II the United States government requested and encouraged citizens to go around distributing adver-

tisements and fliers to homes for people to buy United States savings bonds or war bonds?

MS. DALY: Objection.

A During World War II, I was three years old.

Q I was a little older, but I am not going to incriminate myself.

THE COURT: I remember the NRA, when the Boy Scouts, including me, were asked to go around putting things into mailboxes.

MR. HAMMER: Your Honor, the Post Office might be looking into that in the next few days.

THE COURT: Well, I am sure the statute has run on that particular activity.

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ANNETTE SMITH

DIRECT EXAMINATION

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[148] A The Westchester Community Action Board. I was on the Board for six years. It's a community action program.

I was president of the League of Women Voters, County Board for several years. I am a member of the Board of the Union Child Day Care Center. I was a member of the Board of the Greenburgh Community Center. I was vice-president of one of the major political parties, and I was president of their women's political organization.

I guess—

Q Do you have anything to do wity the Council of Greenburgh Civic Associations?

A Oh, I'm sorry. I was chairman of the Council of Greenburgh Civic Associations.

Q It must have been a traumatic period for you to have gone through to have forgotten.

Did you ever run for public office?

A Yes; I did, once.

Q Where was that?

A In the Town of Greenburgh, for town councillor.

Q And did you ever do any other political work?

A Yes. I worked for an Assemblyman and a Congressman and for the Governor.

Q And was that the local State Assemblyman?

[149] A Yes. Mr. Suchins.

Q And the local Congressman?

A Yes. Congressman Piser.

Q And how many years have you been in that community?

A Twenty-two years.

Q Now, in the course of these activities, whether civic or political, did you ever have occasion to deposit fliers or political brochures in homeowner mailboxes?

A I believe, in every one of the organizations.

Q Was there postage affixed to them?

A No. Most of the time not. We couldn't afford it.

Q And did you have any other function where you deposited things in homeowner mailboxes?

A Well, solicitation of funds for various organizations, cancer drives, Heart Fund. You are asked if you do not find a resident at home to leave an envelope with your name and say you called, asking if they won't use the envelope to mail directly to the organization.

Q So that in all those previous functions and positions you did have occasion at one time or another to deposit mail in the homeowner mailboxes?

A That's correct.

Q And have you ever heard a complaint from any citizen as to any of these deposits?

[150] A No, I haven't. In fact, many of them are grateful, because it is a way of their keeping in touch. In a community like ours there are several newspapers, Not all of them cover the proper areas, and a lot of them do not even purchase a local newspaper, so that they depend on civic associations, those who are active in the community, to keep them informed in this manner.

Q Did you ever have occasion to put anything in a box where it caused the box to fill to overflowing?

A No; I never have, because usually civic people, you just put in one sheet, usually, and at times of the day most likely when the mail has already been taken out. We do it in the afternoons or evenings, whenever the individual has time, and it is usually a deposit of only one sheet.

Q Can you tell us: Do you have an opinion, based upon your years in the community and your various activities, as to where people expect to receive communications from all these groups, civic, political and any of that nature?

A Well, they prefer it in the mailbox, because anywhere else, if you leave it jammed between the screen door or something and it is not picked up, particularly these days, they are very aware of burglars being aware of any sign that the resident is not at home, and by leaving a piece of paper, even in an apartment house, they ask them not to leave anything [151] there, because burglars go around, and if they find the sheet of paper not picked up, those are the doors they try.

They prefer the mailbox, and the sheet is hidden.

And if you leave it laying around, it litters the place, and you are not serving the purpose, because you are doing it to inform the individual, and you want to make sure they receive it. So you leave it in a secure place so it doesn't get wet or blown away.

Q Does your testimony relate to apartment houses as well as individual houses?

A Yes. I have done both.

Q And do you have an opinion as to the practicality of leaving it on steps and stoops?

A Well, besides the snow and the rain, a lot of senior citizens don't like the bending and stooping, and you wind up annoying individuals by making it uncomfortable for them.

We have always found the mailboxes to be the best place.

Q Now, have you made any effort to affix anything with Scotch tape or any kind of masking tape?

A Oh, I wouldn't think of that. The Scotch tape mars the paint.

Q Assuming it didn't mar—

A Well, it would look ugly on the home, and it would [152] take longer to do that. We use volunteers who are giving their time, and we try to have the job done most efficiently and with the least amount of time.

Q Have you tried to hang in onto a doorknob?

A Well, you have to put it in some kind of plastic bag.

Q Mrs. Smith, during the course of your community activities, did you ever receive any agendas from the town board?

A Yes. I was on the mailing lists.

Q And when do you receive those in relationship to the time the meeting occurs?

A Well, the town mails them Friday for Monday. I receive them Monday, and the meeting is Tuesday night.

Q And would that be in sufficient time to mail notices?

A No. There never would be time.

Q Now, will you teil us your opinion, if you have one, as to what would be the impact first on civic groups and secondly on political candidates if they were required to use the Postal Service or required to dsist [sic] from depositing material in homeowner mailboxes?

A Well, from my experience, in our town, civic associations don't have enough money for postage. They barely [153] have money for copying things. Some residents pay and some don't pay, and we use the little bit of dues we do collect to inform every resident in the civic district, whether they pay dues or not, and they never would be able to communicate with the residents in the area if they had to mail things.

As far as political candidates go, it means only rich people would be able to do it, because it takes a constant reminder, and you try to reach as many voters as possible, and in my experience I don't know of a political candidates who hasn't had volunteers of himself go door to door placing material in mailboxes.

Q With or without postage?

A Without.

Q When were you chairman of the Civic Association?

A Only one year.

Q And when did you stop being chairman?

A Sometime around April.

Q And are you still affiliated with that body?

A Yes. I am on the Board of Governors.

Q That is the plaintiff in this lawsuit?

A Yes.

Q Were there any significant issues in the Town of Greenburgh that attracted the attention of the civic community in May or June of this year?

[154] A Well, in June of this year the town had a referendum. It was a reorganization of the town local government.

Q And was this a significant issue in terms of governmental structure of the town?

A Yes. It was going to change the responsibilities of the town supervisor and some of the responsibilities of the town council.

Q And did it have other implications as well?

A Well, it was changing the terms of the supervisor and the Town Clerk. The significance was that it was changing the responsibilities of the Town Council somewhat in terms of approving and overseeing the budget during the course of the year and limiting it only to the yearly approval of a budget.

Q Did this referendum affect both the villages and the unincorporated area of the town?

A Yes; it did, because the Town Council is elected by the villages.

THE COURT: We don't need all this detail. I will accept the conclusion that this was an important matter and they needed urgently to get in touch with the voters.

Q Did the Council of Greenburgh Civic Associations have a position on this issue?

A Yes. We opposed the changes.

Q Did the Town of Greenburgh, the community itself, [155] have a position?

A Yes. They supported the changes.

Q And do you know whether the local newspaper had a position?

A Yes. The Gannett chain supported the proposed changes.

Q Do you recall in April of 1979 what the approximate treasury of the Council was, the plaintiff in this action?

A In April?

Q Yes. You have seen a bank statement.

A Yes. About $350, I believe.

Q And how many registered voters were eligible to vote in this referendum?

A About 35,000.

Q And did the council prepare a flier?

A Yes; it did.

Q Mrs. Smith, I show you Plaintiffs' Exhibit 20.

A This is our flier.

Q Do you recognize that document?

A Yes.

Q What is it, briefly?

A Well, it's a flier stating five reasons why the Council opposed the referendum.

Q Is this the Council's position on the referendum? [156] A That's right.

Q And did you have sufficient monies within the Council's treasury to mail it?

A No. We barely had enough money to have it duplicated by offset.

Q And how many copies, approximately, were made?

A Ten thousand.

Q And were any of these deposited in homeowner mailboxes?

A Yes; they were.

Q And did the Town of Greenburgh, the municipality, deliver any kind of material with respect to their position?

A Yes; they did. On June 1st, they mailed it out first class to every homeowner and every voter in the town, their position on it.

Q You said on June 1st. What was the date of the referendum?

A The referendum was June 5th.

Q Do you have any idea as to how many of these were deposited in homeowner mailboxes?

A This flier here?

Q Yes.

A Well, I would hope all of them were, so we weren't wasting our money.

[157] Q Was that the intention of the Board of Governors, to distribute it that way?

A Yes.

Q And can you tell us how many people voted in this referendum?

A Yes. An unprecedented number, about 6,000 people.

Q And what happened to the referendum?

A We defeated it, five to one.

Q And to your knowledge, to your specific recollection, were there ever any prior June referendums?

A There were other referendums that were not included in the general election. There were issues on park bond issues and things of that sort.

Q And did the Council ever submit a position paper with respect to those referendums?

A I can't remember that far back. I think they supported most of them.

Q Do you recall what the votes were?

A Well, the votes were very low. If you had a few people coming out for it, that would be considered a lot. That was because there was no opposition from the citizens.

Q And how much money did the Council spend in terms of its effort on this referendum?

A We spent $150,000 * * *.

* * * * *

[160] Q And when is the meeting?

A Wednesday.

Q You can go to the Town Board and pick up copies of the agenda?

A Oh, yes. I give loads of time to the community.

Q Please answer. It is available to the public and you can go get a copy.

A That's correct, after Friday.

Q Now, when a matter comes up that is of concern and you wish to notify the citizenry, do you distribute the leaflets and fliers over the weekend, generally speaking?

A Sometimes. People do it when it is most convenient. If there is a sufficient amount of time and a sufficient amount of people, we ask them to do it before 10:00, and the volunteers do it when it is most convenient to them.

Q You wait for the copy of the agenda to come to you through the mail?

A That's correct.

Q And normally you would receive that by Monday?

A Yes.

Q And I assume it would take one day to get the filier made up and another day to distribute it, so you might be distributing it the night before the meeting?

[161] A Yes.

Q You referred to Plaintiffs' Exhibit 20, which is the flier, concerning the Ju erendum. The Council

of Greenburgh distributed that flier with the knowledge that the Postal Service considered it to be a violation of Section 1725, did it not?

MR. HAMMER: Objection, your Honor.

THE COURT: Overruled.

(To the Witness) Did you know you were violating the law?

THE WITNESS: Yes. I think most of us knew we probably were, but we had no alternative. We either beat this or suffer the results for the rest of the time that we live in the town.

Q Well, the referendum was June 5th; is that correct?

A Yes.

Q And notice of the fact that a referendum was going to be held on June 5th was published prior to the 1st of June?

A That's correct.

Q And would it be correct to say that it possibly was published before the 1st of June?

A Probably.

MS. DALY: I have no further questions.

(Witness excused.)

* * * * *

BONNIE ENGEL

DIRECT EXAMINATION

* * * * *

[163] Q And did you serve in any other capacities with respect to the community and with respect to civic associations or school boards?

A Oh, yes. Well, in the Greenville community I also served on the Zoning and Planning Board Committees and I was chairman of the School Board Nominating Committee of Edgemont.

Q And that is the Nominating Committee which selects School Board candidates for your school district?

A Yes.

Q And during the course of these activities did you ever have occasion to deposit any materials in homeowner mailboxes?

A Yes. Many times.

Q And in connection with what particular functions, specifically? What activities?

A Well, as president of the Southern Greenville Association, I put out four newsletters.

Q Over what period of time?

A One year. That was one year. Other times, when other presidents were there, I helped them distribute newsletters.

[164] Q Was this a continuing newsletter of the Civil [sic] Association?

A That's correct.

Q And were they hand-deposited in mailboxes?

A That's correct.

Q Was any postage affixed?

A No.

Q Did anybody ever object?

A No. In fact, the year I was president, because I got out more newsletters than the other presidents, and it takes a lot of work, and they were happy about it and hoped it would continue.

THE COURT: He means, were they happy to have those communications put in their mailboxes?

THE WITNESS: There was never any negative reply, plus, sometimes people would say to put something in their mailboxes; they may not be home, like if there was something particular, like minutes of meetings to be delivered.

Q Can you tell us specificaly what it consisted of?

A Usually one sheet, sometimes two, regular 8-½ by 11.

Q Would it be folded?
A It would be stapled and folded.

* * * * *

[166] THE COURT: Well, I don't know if her experience is typical in that respect. Some people may be natural targets for junk mail. I don't know. I have often suspected that I am.

A Well, advertisments, that kind of mail. I probably get bulletins.

Q Could you give us an approximate percentage of how much of your mail consists of so-called junk mail?

A Probably 50 percent.

Q Now, can you describe in the southern Greenville area the type of mailboxes that are involved? Are they attached to the front door or near the front door or out at the curb, as rural mailboxes would be?

A We have both, depending on which section I'm in. We have those by the door, and some with letterboxes inside the door, which is good, and there are many by the road.

Q And have you had occasion in Greenville to deposit materials in both of these types of boxes?

A That's correct.

Q And is there a specific problem in terms of rural-type boxes or a different logistical problem in terms of your ability to do it?

A Well, it's more convenient to distribute to boxes [167] out on the road. The homes are usually on quarter to half acres, so its more difficult when you have to go up to the door, so it's quicker for us.

Q Are there some areas where the rural boxes are together for several houses?

A Yes.

Q Do you deposit materials in those?

A Yes.

Q And how far back from the road would those homes be?

A Quite a bit. If it's a half-acre lot, and this was in front, I guess it would be a quarter of an acre down.

THE COURT: That would depend on how wide the lot is. Let's not try to qualify her as an expert in mathematics.

Q Have you ever tried to place the mail on the steps or under a mat?

A Well, when I first started I didn't have any idea how to put it, but if I put it between the storm door and the door, if somebody comes after me it flies away.

As far as mats are concerned, there aren't necessarily mats, and I don't think I would have thought of putting it there, because if I let it stick out it would be dirty or —I don't know—I wouldn't look down, so I assume other people wouldn't look down.

[168] The doorknobs are usually round. We can't do anything with that. Then there are knobs on the doors and there is a question of which door do you put it on if you don't put it near a mailbox.

Q You mean there is no definable front door?

A It's hard to tell in some areas, because you're not sure which door a person goes into.

Q How many home units are there in southern Greenville?

A 425 homes.

Q And would you say that southern Greenville, the southern Greenville community, is at the lower end, the middle or the upper end of the socio-economic strata of the Town of Greenburgh?

A The upper end.

Q Have you ever considered the possibility, as president of the Southern Greenville Council—are you still on the Board, by the way?

A Oh, yes.

Q Have you ever considered the possibility of the question of mailing your communications?

A Well, it depends if you have money. Possibly, except there are problems even then. There are times when—for instance, I just delivered a newsletter, and I got it quite late to delivery, and there wouldn't have been time [169] before the next meeting.

Q When did you deliver it?

A Saturday, this past week, and that was for a Wednesday meeting. So since we are all voluntary workers, there isn't a great deal of time.

Q So you distributed it Saturday, June the 2nd, for a meeting that was last night?

A Last night was Wednesday, yes. Last night.

Q The 2nd; is that correct?

A Correct.

Q Now, did you ever have occasion in the course of any of your positions to use the mails, the actual U.S. Postal Service, with postage, for any civic function?

A Yes.

Q Can you tell us when that was?

A Yes. I was School Board Nominating Committee chairman—president. There was a sudden death, and they were intending to replace a Board member, and I wanted to get information to the School Board before they decided to choose, because we felt the Nominating Committee as an appointed body of our particular part of town, wanted to preserve its rights, and we felt we wanted to pick the School Board member or at least make recommendations.

So I wrote letters to only seven people. Since [170] there were only seven people involved, I felt I would put it in the mail, because if I took that amount out of my pocket, it isn't so impossible.

Q You paid for it yourself?

A Yes, I paid for it myself, and I thought I had time, and apparenty when they turned up at the meeting, which I wanted them to get there before the general meeting, some of them hadn't received it, and I was sorry I did it that way.

Q Did you mail it at the post office?

A Yes. I went to the Scarsdale post office and put it in the post office.

Q How many days before the meeting was this?

A Well, I mailed it on Sunday. It ended up at the special meeting came Tuesday night. I hadn't realized it would be that week, and two or three of the members didn't receive it until the following Thursday.

Q And with respect to the Tuesday meeting?

A Yes.

Q Were the addressees, the people to whom you were sending it, also in the same post office district, Scarsdale?

A Yes. We were all in the same post office district. We have another one. Some go to Hartsdale.

Q Mrs. Engel, do you have an opinion, based upon your [171] community and civic activities, regarding the effect on the Greenburg Civic Association if you were no longer able to deposit fliers in the mailboxes without postage?

A Well, it would considerably reduce anything we could get out. I'm not sure what would happen. I don't think we would be able to do it. We wouldn't have enough funds, and there is a problem with workers, and when it comes to doing the work, it's difficult to get people. It's difficult, even when an emergency happens.

Q What would be the effect on the operations of civic groups?

A I don't think we would be too effective.

Q With your newsletters and fliers, do you cover only dues payers?

A No. We cover everyone.

Q Do you have any knowledge with respect to the referendum that took place in June of this year in the Town of Greenburgh?

A Yes. I participated in that.

Q Did you have occasion to distribute any fliers?

A Yes. I was heading a committee on the Greenburgh Community Council to find out more about it and to try to get people involved in the referendum, and then I went to the Greenburg Civic Association, * * *.

* * * * *

[174] A Well, we all tried to put it in a place where we feel it would be reached. It doesn't fit under doors. This was after I found out initially—I didn't know we aren't allowed to place them in the letterboxes. When I found out we weren't, it didn't exactly thrill me to go ahead and proceed that way, and I couldn't think of other ways. I tried under the door, on a doorknob. Mats I never really noticed. Some places have them, have mats, and some don't.

I sometimes don't put it in the postal box if I see mail piled up by the front door. I sometimes see when somebody has mail and perhaps a newspaper piled up by the door.

THE COURT: Have you ever tried using a piece of Scotch tape, taping it to the door?

THE WITNESS: No. I was aware you could do that, but I felt it would be too time-consuming.

Q Well, generally speaking, what is the average distribution that the associations that you are associated make, size-wise?

A It varies from year to year from the president, depending on how much time we are willing to give it, because remember, these distributions and writing these newsletters are time-consuming.

* * * * *

[177] THE COURT: You still pay for it?

THE WITNESS: Oh, sure. Of course, we pay for it. We wouldn't get it otherwise.

Q Mrs. Engel, based upon your experience that you have described, do you have an opinion as to whether

there is any practical alternative to civic associations depositing material in homeowner mailboxes?

THE COURT: She has answered that her civic association would't be as effective.

MR. HAMMER: All right. No further questions.

THE COURT: Thank you.

(Witness excused.)

* * * * *

PAUL ROSENZWEIG

DIRECT EXAMINATION

[184] Q And is it a corporation?

A Not to my knowledge.

Q Does this civic group engage in various civic functions on behalf of its constituency?

A Yes, sir.

Q And does it lobby for legislation?

A Yes, sir.

Q And I show you Plaintiff's Exhibit 21 for identification.

Can you tell us what that is?

A This is the constitution and bylaws of The Saw Mill Valley Civic Association.

Q And are you familiar with that?

A Fairly so.

Q And is that what governs generally the operations of The Saw Mill Valley Civic Association?

A Yes, sir.

MR. HAMMER: I offer that in evidence, your Honor.

* * * * *

[186] Q And are you familiar, Mr. Rosenzweig, with the annual dues of The Saw Mill Valley Civic Association from 1972 to 1974?

A Yes, sir.

Q Do you know what that was, per family?

A Yes, sir.

That was $3 per family then.

Q Was it subsequently raised?

A It was subsequently raised to $5.

Q Do you know what the approximate treasury of The Saw Mill Valley Civic Association is?

A $125.

Q As of this time?

A As of this time.

Q And The Saw Mill Valley Civic Association, that is one of the plaintiffs in this lawsuit?

A Yes, sir.

Q You are familiar with that?

A Yes, sir.

Q Now, can you tell us, Mr. Rosenzweig, in the years 1972 through 1976, approximately how many dues-payers there were in Saw Mill Valley?

A Well, we started the first year, which was 1972, with a little over 100—107, to be exact. And then [187] for the remaining 1972 through 1976, we ranged, you know, 124 to 130 by year; 130, 127, 120, 126, to be exact.

Q And in 1972 to 1975, did The Saw Mill Valley Civic Association have any policy with respect to its regular or quarterly or annual meetings, in terms of distributing notices or fliers?

A Well, the—

Q And if so, if they did have a policy, what was it?

A Well, The Saw Mill Valley Civic Association, like so many others, attempts to contact their—the entire constituency—I think that is the right word—and to get them active in the meeting, or whatever issue was involved.

What we tried to do was to mail to those that were currently dues-paying members and had been paying dues in the year or two immediately preceding. The remainder, we distributed them by hand.

THE COURT: Excuse me.
MR. HAMMER: Yes, your Honor.

(Pause)

THE COURT: Go ahead.

Q And can you tell us, in that 1972 to 1975 [188] period, approximately how many were mailed and how many were hand-distributed?

A Well, 107 was our usual mail group. The remainder, which will be 310, we would distribute.

Q And how were these distributed?

A By hand into the mailboxes of the people.

Q With or without postage?

A Without postage.

Q Did you have the funds in the civic association to mail to the balance?

A I guess on any one we would have had enough funds to mail that one.

Q Well, how many approximately during 1972 to 1975, approximately how many meetings or notices did you have on an annual basis, if you can recall?

A Well, we were set up for quarterly meetings, so you had a minimum of those four. And then whenever there is a special issue, of course we would have to call a special membership meeting.

Q Were there several special meetings?

A There had to be because of the issues that were then hitting us throughout the community.

Q Did they at least equal or did they exceed the regular meetings?

[189] A I just don't know the answer to that question.

Q Okay.

And how were these notices on the special emergency meetings distributed?

A Those always had to go by hand. There was no—both the time constraint and the money would make any other means prohibitive or impossible.

Q Now, I direct your attention to June of 1976, Mr. Rosenzweig, and I show you Plaintiff's Exhibit 22, which was also the Government Exhibit 3 for identification at a deposition.

Do you recognize that?

A I do. My name is in it twice.

Q And do you recognize it, aside from your name being in it?

A Yes.

Q Can you tell us what it was?

A Yes.

This was the election notice for the June 1976 quarterly meeting, and went the regular route.

Q Was it—

A For a regular meeting now.

* * * * *

[191] Q What is—do you recognize that letter? What action was taken, if any, as a result?

A Yes.

Fridtjof Schroder reported it to us at the meeting. What happened was that the Post Office sent him this letter about mail that the streets listed in there are not in our association at all, but he went to the Post Office because they wrote him the letter.

Q When you say "mail," can you be more explicit as to what it is referring to?

A Well, they are talking about notices that were—well, I'm quoting—"Deposited first class mail without postage."

Q And does that refer to Plaintiff's Exhibit 22?

A Yes, because the timing is exactly that.

MR. HAMMER: I offer that letter in evidence.

MS. DALY: No objection, your Honor.

(Plaintiff's Exhibit 22A received in evidence)

Q Now, what action, if any, did the executive committee take as a result of this notification from the Post Office?

A Well, we felt we had no choice. And as a [192] result we suspended all hand distribution of meeting notices.

Q And can you tell us what regular meetings, if any, you had in 1977, 1978 and 1979?

A I don't have a categorical list of each of them.

Q How many in each year?

A There was one or two this year. I know there was one just recently. I know there was one in late 1978. I know that that quarterlies have fallen by the wayside because we just cannot communicate to the community.

Q Do you know if these—do you know if there was one in 1977?

A I would have to say we have never gone a year without—without one. So I would have to—

Q Now, were any of these notices in 1977, 1978 or 1979 hand deposited in mailboxes?

A No.

Q Were they mailed?

A There was a mailing to only the few that we had on our current group.

Q Approximately how many?

A 170.

Q In each one of these years?

[193] A That's right.

Q Approximately what percentage of the homeowners in the area does that cover—or did that cover?

A That would cover 30 some-odd percent, or 35 percent.

Q Now, were there any emergency or special meetings in 1977, 1978 or 1979?

A We tried to hold them but we couldn't because we couldn't get to the people.

Q Were there any issues in 1977, 1978 or 1979 in the community that were of concern to The Saw Mill Valley Civic Association?

A Yes, sir.

Q Did you send any notices or call any meetings with respect to these?

A We only could circulate to our executive board at that point because the money—what happened was that as a result of the 1976 thing—number one, we stopped collecting dues because we could not reach the community. The treasury has gone down constantly since then. And just to conserve, we have just had to cut back, as a result, the association is, well, almost dying.

Q Can you tell us, Mr. Rosenzweig, approximately in 1974 to 1976 how many people attended the meetings of [194] The Saw Mill Valley Civic Association, both general, regular meetings, and emergency, special meetings?

A Well—

Q A range.

A We would get a minimum of 35 and as many as 100 people to show up to a meeting.

My recollection is only based on the space that we use at St. Joseph's of Arimathea, a church, and the fact that we have to go into their storage rooms for chairs. You know, 15 up front, and then we have to go into the back for more than 16.

MR. HAMMER: Your Honor, one moment. I see that there is one of the witnesses that I'm going to call right after Mr. Rosenzweig, who has come into the courtroom.

THE COURT: Is he going to be a fact witness?

MR. HAMMER: Yes.

THE COURT: All right.

Then the clerk will show him where he may wait in the witness room outside.

MR. HAMMER: Your Honor, I would like to offer Plaintiff's Exhibit 22 in evidence, which is the June 1976 meeting notice.

MS. DALY: No objection, your Honor.
THE COURT: All right.

[195] (Plaintiff's Exhibit 22 received in evidence)

Q Now, Mr. Rosenzweig, can you give us an approximation as to how many people attended The Saw Mill meetings in 1977, 1978 and 1979?
A We have been running 15, 17, missing a quorum.
Q When was the most recent meeting you had?
A Lst [sic]—we are in July—last month, June of 1979.
Q And how many people did you have?
A I think it was 17.
THE COURT: What is a quorum?
THE WITNESS: I'd have to get the constitution, your Honor.
THE COURT: Well, that's all right.
1u [sic] is not a quorum and 35 is?
THE WITNESS: Yes, sir.
THE COURT: All right.
Q. Can you describe to us the types of mailboxes or mail receptacles that exist in the Saw Mill Valley community?
A The one in front of my home is typical. It is on a post at the curb. It is the standard—
Q It is a rural-type box, so-called?
[196] A Yes, that's what it's called.
Q Is that the mailbox in which Sawmill has been depositing—
A Yes, sir.
Q —notices?
A Yes, sir.
Q And have you done this personally?
A Yes, sir.
Q The regular mail, the United States Postal Service mail, is that put in these boxes?
A Yes, sir.
Q And does he come on foot or on truck?
A Gruck [sic].

Q And has your association—has Saw Mill ever considered the use of bulk mail?

A We have. I have done it both for Saw Mill and for other groups; considered it, but never been able to use it.

Q Have you had any experience with bulk mail in terms of any of these other groups?

A Yes.

Q Are they civic associations, noncommercial entities?

A They are noncommercial entities.

[197] Q And can you tell me what experiences you had, in terms of your own particular community?

A Okay.

Because we have a split postal zone—postal address problem, we—

Q You mean between Elmsford and White Plains?

A I'm sorry, again Elmsford and White Plains.

We run into the problems of dealing with the Post Offices.

When I served on a committee for the Elmsford School Board, the School Board had the exact same problem; that that is, that unless you mail from both Post Offices separately to the respective addresses, the delays become unconscionable.

I was asked to serve on this committee because I was complaining bitterly to the Elmsford School Board that my own copy of the budget was not being delivered to me. At that time I lived on Rita Lane, which was the White Plains Post Office. The School Board mailed from and was located in the Elmsford Post Office. There is a cost factor and a logistics factor. We don't have 200 residents in the Elmsford Post Office so that the 150 or 140 people in the Elmsford Post Office would have to be mailed first class mail, because it is my understanding that you must [198] mail in bulk 200 minimum in order to take advantage of the bulk permit.

In addition, in order to service the White Plains people, we would have to have—we would have to mail from

White Plains, find a White Plains Post Office to deposit it in, because you can't deposit it in a mailbox. It has to be hand delivered to the Post Office. There is an initial fee, there is an annual fee, and then there is the per unit charge fee.

I also investigated the possibility of using the charitable rights. And that was not available to us, even if we chose to go the bulk rate in the White Plains Post Office, because as an unincorporated association, we were not eligible for the charity or nonprofit designation since we were not registered under Section 501 of the Internal Revenue Code.

Q Did you—

A I'm sorry.

Q Are you finished?

A I think so.

Q Did you discuss this with the executive committee at any of the meetings of The Saw Mill Valley Civic Association?

A At an executive committee meeting, it had been [199] raised, and I mentioned most of this information.

Q Now, Mr. Rosenzweig, I show you Plaintiff's Exhibits 23 through 34. And just look at those briefly, please.

A Yes, sir.

Q And if you recognize them, can you tell us whether they were mailed through the U. S. mails, either in whole or in part, or hand distributed without postage?

A Well, the last one, which is—

Q Well, Mr. Rosenzweig, when you refer to one, please refer to the exhibit number.

A I'm sorry. Okay.

Exhibit 30 was never hand distributed, because that is a 1979 dating. That was our most recent meeting at the church. I believe—I'm just checking dates.

All the others went the dual route.

Q Well, look at each one separately.

A Okay.

Q If you know.

A 23 must have gone both routes. 24, I'm not sure about only because it is addressed to the committee and the concerned members—the executive committee and the concerned members. That may have been only mail. 25 definitely went both routes.

[200] Q When you say 'both routes,' do you mean—

A Hand delivery and mail.

Q And 170 mailed and the balance hand distributed?

A Yes, sir.

Q I see

THE COURT: And when you say 'hand delivered,' hand delivery into a mailbox or where?

THE WITNESS: Yes, sir, into a mailbox.

Q Without postage?

A Without postage.

I'll be more specific.

THE COURT: In other words, you are defining the notice—

THE WITNESS: This is all pre, sir, Exhibit 23 is January 1973. 24 is January 1975. 25 is January 1975. 26, second special membership meeting, 1975, hand delivery without postage in mailboxes plus the mail route. 27, fourth quarter meeting, November 1975, hand delivery and deposit in mailboxes without postage.

28, quarterly meeting 1976, February 23rd, 1976. That would be hand delivery and deposit without postage.

April of 1978—

THE COURT: Well, who got the—who got the mail [201] delivery?

THE WITNESS: The current membership—I believe I stated the current membership plus any members from the first and second preceding years who had not yet paid their dues. That was considered our cadre or our core.

Q When you say the current membership, you mean people who had paid dues?

A Yes, for that then year.

I believe I'm on Exhibit 29, April of 1976, that would be—that would hve [sic] been distributed both by mail and by deposit in mailboxes without postage.

Exhibit 30 I believe I stated was only mailed, was not hand delivered. That is for a meeting of June 4, 1979.

Q That is the current meeting?

A That is the current meeting.

Q Now, Mr. Rosenzweig, have you collected—has Saw Mill collected any dues for the years 1977, 1978 and 1979?

A No, sir, we suspended dues.

Q Can you tell us why not?

A Well, we couldn't get to people other than the cadre.

* * * * *

[204] THE COURT: Well, you had a mailing list before when you were mailing to the membership.

THE WITNESS: Of a hundred and—yes, 120, 115, 125.

THE COURT: All right.

THE WITNESS: That is our mailing list.

THE COURT: All right, 125.

You go ahead and send out those notices and it costs you 30 cents apiece, let's say. That is only—

THE WITNESS: $37.50.

THE COURT: Yes, $37.50.

THE WITNESS: Yes, sir.

THE COURT: And of that mailing list, that select cadre, as you call it, you ought to get back dues from 100, so that at $4 apiece you have gotten $400. That is $275 you wouldn't have, $275 to carry on what I'm sure you feel is the beneficial work of the association.

THE WITNESS: But a civic association cannot only exist on that small group, because the difference between our usual 125 and the 170 number is that there is a constant fluctuation of people who may drop out for a year, because in civic matters and in civic association problems you get—you try to get to those people who

are most immediately affected by whatever issue is then [205] surfacing in the community.

And if it is, in our case, we have West Rumbrook Park, the people who are most distant from West Rumbrook Park are not the ones going to respond, be they dues payers or not. We have to get to these people, your Honor, who will provide the groundswell so that when the issue is heard in Town Hall, be it at the zoning, planning or town board itself, they are going to be there in force. It's been my experience that the town board, while it recognizes that a civic association may have brought the people out, the town board responds differently when there are 150 people there or 500 people there or 50 people there. If 500 people or 400 people show up because of an issue that concerns them, the town board will then either reconsider or listen with a different ear than if 50 people are there.

It is our need to get to the 500, because rarely is there an issue that concerns solely our association. It sometimes happens.

THE COURT: But what I'm saying is this: By getting the $400 less the $37.50—call it $350—you then have the funds that you can get to the 500.

* * * * *

[207] * * * And we only have three or four days, and we can't even afford the time lag that is built into the postal situation.

It may be slightly tangential, but particularly with the people in the White Plains Post Office address—and I think I speak from 15 years' experience with that, with that problem—my mail, my professional mail for the time that I lived at 5 Rita Lane, your Honor, had to be addressed at home—had to be addressed in the office because the lag in the White Plains Post Office just made me miss too many professional things. And that mail from both the American Institute of CPAs and the New York State Society of CPAs was rarely sent first

class mail. I could not afford that time lag of missing meetings.

So it was sent to my office in New York.

Emsford [sic] is a different situation. The Elmsford mail pretty well gets there on time. But the bulk of our association is not in Elmsford, it is in the White Plains Post Office. It is not even serviced out of the main Post Office, it is serviced out of I believe Fisher Avenue.

Q When you collected the dues in the past years, did the people mail the dues back to you? How did you [208] collect them?

A I was never treasurer. But most of the time I believe that the dues came in at a meeting.

Q And during the years before 1976 when you had the regular quarterly meetings and emergency meetings—

A Yes.

Q —did people pay at all these meetings? Was there a treasurer who said "You haven't paid, please pay"?

A The treasurer—the treasurer was always cognizant of those people present who, you know, tried to vote on an issue or something like that. If they weren't on the paid list, he would say, you know, "You have got to pay your dues," and he would get people paying right at the door, if you will.

Q And were dues collected based upon the turnout at a large meeting?

A I think so.

Q And were dues collected at any one particular annual meeting, or was it a continuing process?

A It was always a continuing process.

Q So that, in your opinion, does the fact that you have one meeting a year—does that, in effect, affect the dues situation?

A Well, the fact that people—people don't know, [209] people can't come, people don't come, we don't collect dues.

Q Have you covered the issues that have arisen in the community—

A No.

Q —at the general meeting?

A No, not now. Not now because we can't get enough people out. We can alert them, the few people who show up, but we don't get the turnout, be it at the public hearing or the three boards which I mentioned before.

Q Now, based upon your service on the executive committee, during the last two or three years have you gotten any new members of the executive committee, new people in the community?

A No, we don't even—we haven't even mailed or contacted—we haven't contacted new people in the community. There is a small turnover of homes, of new people coming in, of new people coming in, that kids say so-and-so moved or something like that. We have not even gotten to these people. Most of them don't even know that we exist.

Q Do you have an opinion as to what has been the impact on the Saw Mill Valley Civic Association since 1976 by reason of the fact that it has not hand distributed?

A Well, I think the opinion—rather than opinionate. [210] I think the June 4th letter to the—that we mailed, the June 4th, 1979 meeting letter I think states it quite aptly. It says: "An urgent appeal to revitalize our association."

We need revitalization because people don't know about us. We need new offices, new executive board, volunteers, and we can't get them.

Q Now, based upon your experience in the community, do you have an opinion as to where the people in the Saw Mill Valley expect to receive their civic notices?

A The same place they always have: in the mailbox, along with their mail and their newspapers.

Q Now, have you had any civic discussions over the years as to civic fliers being left at a location other than being deposited in the mailbox?

A There have been discussions both at Saw Mill, at council, and before that at the Greenwood Lanes Civic Association. Nothing else really works.

MS. DALY: Objection, your Honor. He is testifying as to the conversations.

THE COURT: Yes. Sustained.

* * * * *

KEVIN O'NEILL

DIRECT EXAMINATION

* * * * *

[223] Q And can you tell me what it is in one phrase, what it represents?

A It is a notice to the public about the possibility of invoking the snow ordinance for picking up of refuse.

Q And was that notice distributed to the community?

A Yes, it was.

Q And can you tell me approximately when?

A It was some time in December.

Q Of which year?

A Of 1978.

Q And can you tell me how it was distributed to the community?

A It was distributed—

Q By physically, what method?

A It was distributed by my sanitation crews.

Q How did they distribute it?

A By hand, and left it at each individual stop.

Q And where did they put it at—when you say "each stop," you mean each home?

A Each home.

Q And where did they put it?

A In the mailbox.

[224] Q And was there any postage on it?

A No, sir.

Q And can you tell me, what was the purpose of this particular distribution?

A Well, back in—

Q And why it was done in this particular method?

A Because of a history of very high compensation cases for backyard pickup of garbage, which is customary in the Town of Greenburgh. The town board passed an ordinance early on in the year delegating the authority to me to declare a snow ordinance and mandating that if the garbage was to be picked up in inclement weather, that the residents would have to put the garbage out at the curb.

Q And why was this notice sent in this particular manner?

A Because I thought it was the most direct, the most economical and the most practical.

Q What are the implications if the people are not aware of this particular ordinance of your authority under it?

A There are serious implications. There would be a miss of garbage picked up, which could create a health hazard. * * *

* * * * *

[226] Q Did the Town of Greenburgh recently have a tax increase, to your knowledge?

MS. DALY: Objection.

THE COURT: Well, I'll permit it. It is introductory.

A I think they had a notorious increase of 21%, which is pretty well known in the territory.

Q And did the chief executive officer of the town issue any instructions with respect to budgetary expenses of your department?

A We started a budget hearing from eight o'clock one night until two o'clock in the morning. I think I got cut in every area of request.

Q What instructions—

A Direct instructions were to keep everything to a minimum.

Q And why did you not put this notice in the newspaper, Mr. O'Neill?

A I don't believe that the newspaper really thoroughly covers the entire constituency. There are similar notices that we do put in the newspaper when there is an occasional change on a day pickup. And historically I get many complaints saying that "I don't read that newspaper."

* * * * *

[228] A The meters are read on a quarterly basis.

Q Where are the meters located in homes?

A Most of the meters are located in the cellar, basement, of the home.

Q Inside the house?

A Inside the house.

Very few are outside of the homes.

Q And have you had any experience with respect to meter readers going to homes and finding nobody there?

A It is a continuing problem.

Q And can you tell us what procedure you follow?

A Well, if nobody is at home, the meter reader indicates on the card that he couldn't get access to the building, and he has a card with him requesting that the homeowner read the meter, with directions for them reading the meter, and that card is also left in the mailbox.

Q I show you Plaintiff's Exhibit 32.

A It is one of our standard forms.

Q Can you read it without your glasses?

A Not really. Now I can.

Q Is that one of the meter cards to which you refer, or is it a facsimile?

A I would say it is identical to the—

[229] Q Well, is it scotch-taped like that?

A No.

Q Is it one piece of paper?

A It is one piece of paper. It is a card.

Q And where do you direct your meter readers to leave that card?

A Again, in the mailbox.

Q And what is the purpose of that card?

A The purpose of that card is to eliminate the necessity for duplication of labor for people having to go back to a residence that they can't get access to.

Q And does that card have postage affixed to it as you leave it in the mailbox?

A There is no postage necessary.

Q Well, that is the return card?

A Yes, the return card. No.

Q It is a self-addressed, stamped return card that the town has, is that correct?

A Yes.

MR. HAMMER: I offer that in evidence, your Honor.

MS. DALY: No objection, your Honor.

(Plaintiff's Exhibit 32 received in evidence)

* * * * *

WALTER JOHN SCHOONMAKER

DIRECT EXAMINATION

* * * * *

[231] Q How long have you been the chief?

A Eight years.

Q Do you live in the community where the fire district is situated?

A Yes.

Q Can you just tell us briefly, is the Hartsdale Fire Department composed of paid or volunteers, or a combination?

A It is a combination. It is roughly 65% paid and 35% voluntary.

Q And are these volunteers an integral part of the fire system, both in terms of services and finances?

A Definitely.

Q And do they utilize funds in the course of their operations or do they need funds?

A Yes.

Q For what?

A To run some of their programs which benefit the public both fire safetywise and recreationwise. They run the Memorial Day Parade which is an annual event.

Q And do they—how do they raise funds?

A Right now they do it by appeal to the public.

Q And does the fire district provide any money?

[232] A No. It is strictly volunteers.

Q What are the implications for the fire district, if there are no volunteers, both in terms of your operations as chief and with respect to the taxpayers of the district?

A Well, we would have to hire more paid firemen at an increase in taxes. It would also—you know, we could never hire the amount of men or afford to hire the amount of men that the volunteers make up for free.

Q Can you tell us, Mr. Schoonmaker, approximately how many apartment houses there are in your fire district?

A About 32.

Q Are you familiar with the town as a whole, the Town of Greenburgh?

A Basically.

Q Are there apartment houses in other areas of the town?

A Yes.

Q Can you tell us approximately how many homes there are in the fire district?

A There are—

Q Single family homes?

A My guess would be somewhere around 4000.

Q Now, during the course of the activities of [233] the district, Mr. Schoonmaker, does it have a program of communications with the people in the community?

A Yes.

Q Can you tell us generally how?

A Okay.

Four times a year we publish a newsletter which we hand deliver to each resident. And one of the reasons for hand delivering it is that it gets only to the residents of the Hartsdale Fire District and not to residents who live in surrounding communities or districts.

Q And can you tell us—for how many years have you been distributing this type of newsletter?

A To the best of my knowledge, since 1962.

Q You have been with the district since 1962?

A Since 1959.

Q I see.

And how are these newsletters described? Physically, what is the procedure?

A We—well, first off, we print them ourselves and fold them, and we take them out on a fire engine. A group of men go out in different areas during the day and deliver them.

Q And where do they put them?

A The mailbox.

[234] Q Is there any postage affixed to them?

A No.

Q Have you ever received any complaints from any members of the citizenry?

A No.

Q And to your knowledge, has this been going on since 1962?

A Yes.

Q Do you have an opinion based upon this 17 years of experience in this particular area as to where people expect to receive these fire district notices?

A I would think in their mailbox.

Q Do you have any knowledge as to whether the volunteers have distributed any notices in this manner?

A Yes.

Q What is that—

A Over the years they have used the same method for their fund raising. They have hand delivered appeals to the public.

Q Now, can you tell us how much money is in the fire district budget for office, clerical, and postage?

A About $2500.

Q Do you use this figure in the budget?

A Yes.

[235] Q What would be the implications for the fire district if you were required to mail these notices four times a year?

A Well, one or two things is going to have to happen. You are either going to have to forget about delivering the newsletter or we are going to have to increase the budget considerably.

Q Now I show you, Mr. Schoonmaker, Plaintiff's Exhibits 33 through 37.

Would you take a moment, just look at those?

A Yes, sir.

Q Do you recognize those?

A Sure.

Q Can you tell me what they are?

A They are the newsletters that we deliver.

This last item is a—

Q When you say the last itme, refer to the number at the top, please.

A I'm sorry.

Item 37 is a Vial of Life Program which we were asked by the Town if we could help them deliver it. We were in the process of delivering a newsletter, so we added it to the newsletter.

Q Are the notices that you distribute, commercial [236] or noncommercial, Mr. Schoonmaker?

A Noncommercial.

Q And do they contain any educational material concerning fire safety, smoke detection devices?

A That is the reason for printing them in the first place.

Q Now, do you deliver to apartment houses as well?

A Yes, we do.

Q And is there a mail room in the apartment house?
A No.
Q In the front of the building?
A Well, there is—you might call it a mail room.
Q A vestibule?
A Yes, with a table for large parcels and mailboxes on the wall. We don't have access to these mailboxes.
Q Have you ever placed any of those newsletters on the table in this room?
A We did originally. We found that they never got delivered.
Q And how did you go about delivering them after that?
A We go to each door in the apartment house and [237] slide them under the door.
Q In the apartment house?
A Yes.
Q And can you—in the course of the—with respect to the single-family homes in the community, can you, in like manner, slide it under the doors?
A No. The apartment house door is loose-fitting because it is an inside door, where private homes they have storm doors or even if they don't, the front door is so tight as to make it impossible to get anything underneath it.
Q Now, I'm not sure if I have asked you this already. How were these things physically put in the box?
A In the person's mailbox?
Q Yes.
A By a firefighter.
Q And what does he do with them physically? Are they in one sheet? Are they folded? Are they stapled? Can you tell us?
A Yes. They are folded, usually about the size of a business envelope when they are finished being folded.
Q About the size of a No. 10 business envelope?
[238] A Like so.

Q Indicating about the size of a No. 10 business envelope.

Now, based upon your knowledge of the community, is it possible to attach these notices to the doors of the homes?

A No.

Q Or to the doorknobs of the homes?

A No.

Q Do you have any knowledge, Mr. Schoonmaker, as to whether or not any other fire districts pursue this same procedure?

A Yes, I do.

Q Do you have meetings with the other fire districts?

A Yes.

Q Are there other fire districts in the town?

A Yes, sir.

Q And, to your knowledge, what other fire districts in the town follow this procedure?

A Fairview Fire District is following it, and I believe that the Greenville Fire District is following it.

* * * * *

JOAN WILDERMANN

DIRECT EXAMINATION

[246] THE COURT: What is the name?

THE WITNESS: Glimpses. G-l-i-m-p-s-e-s.

THE COURT: All right.

Q Is that a newsletter?

A Yes.

Q And can you tell us what functions it fulfills in terms of your civic association?

A We put it out about ten times a year, usually after our board meetings, our executive board meetings. We inform them of meetings like, for instance, last April we were just getting involved with having sewers put into our areas. We had to inform people of meetings that were behing held at the Town Hall to go over the

plans, and so on, and tell them of different meetings that are coming up on zoning changes.

Q And it covers the wide variety of areas that you previously alluded to?

A Exactly.

Q And can you tell us how it has been delivered over this ten-year period—I'll withdraw that.

How many years has it been in existence?

A I think ten years.

Q And over this period of ten years, how has it been delivered to the community?

[247] A Through this network of block captains.

Q And physically, what is done with it?

A We distribute to the block captains, and then they walk around and distribute it to each homeowner.

Q And how do they do that physically? What do they do with it?

A Well, they usually put them in the mailboxes.

Q Is there postage affixed to it?

A No.

Q What type of mailboxes exist in this community? Are they so-called rural boxes at the curb or are they attached to the home?

A Except for one area of new homes, approximately, say 26 homes which were built evidently after that law was put in by the Post Office, everybody has their box attached to their house, near their front door in some way.

Q And have you, yourself, ever delivered any of these notices in the course of your civic activities?

A Yes, I have.

Q Do you still?

A Yes.

Q And have they always been distributed in good weather?

A Well, they are distributed whenever the need [248] arises; whether it is good or bad, we have to get them out.

Q And do you recall every having made distribution in bad weather?

A Yes, I do.

Q And have you ever recalled having made distribution in the evenings?

A We try not to go out in the evenings.

Q Have you ever—

A I have never personally delivered anything in the evening. I won't go out in the evening, no.

Q To your knowledge, have any of the block captains ever delivered in the evening?

A I doubt it.

Q Have they ever delivered on weekends?

A Yes.

Q Now, during this ten-year period of time in which you have been distributing this—at approximately ten times a year?

A Yes.

Q Do you ever distribute any kind of notices on an emergency or ad hoc basis?

A Yes, we do.

Q Can you tell us why that is done as opposed to [249] the regular monthly notice?

A Well, this last one, if you want me to allude to it, the sewer one that—we are on septic tanks now in our area. And when the notice came through that we would be the first ones to receive the federal funds for the sewers, there was going to be a meeting held at Town Hall on the Monday after Easter.

We first got the notice—I first got the notice about the —after my board meeting, around the 10th of April, I think it was, or the Tuesday before Easter.

Q Of 1979?

A Yes, this past year.

Our board meeting was Tuesday. We made up the flier on Wednesday. We had it printed on Thursday. Then we had to deliver it over that weekend because the first meeting was being called for Monday.

Q The following Monday?
A Yes.
Q At the Town Hall?
A Yes.
Q I see.
Is the input of your community necessary in terms of this federal funding for these sewers?
[250] A Yes, it was important. Yes.
Q Have you ever during the course of these ten years received any complaints from any members of the community as to the deposit of these materials?
A No.
Q Generally, how many sheets does this newsletter consist of?
A In the interest of economy, it is usually one sheet, perhaps printed on both sides.
Q And when it is put into the mailbox, and based on your own experience, how is it physically put in?
A I fold it in three so it looks like a business letter size.
Q To your knowledge, Ms. Wildermann, do any of the utility companies—are you serviced by Con Edison?
A Yes.
Q Does Con Edison or any other utility company deposit any invoices for bills in that manner?
A No.
Q Do you receive it through the postal service?
A Yes.
Q Now, I show you Plaintiff's Exhibit 38 through 41, inclusive.
Do you recognize those? Take one moment to look [251] at them, please.
A All right.
Q Were these hand distributed?
A Yes.
Q Were you involved in these four exhibits?
A Yes, I was.

Q How were they distributed?
A By our block captains.
Q Were they put in people's mailboxes?
A Yes.
Q Was there any postage?
A No.
MR. HAMMER: I offer these in evidence.
MS. DALY: No objection, your Honor.

(Plaintiff's Exhibits 38 through 41 received in evidence)

Q Now I show you Exhibit 38. Does this refer to the sewers to which you previously alluded?
A Yes.
Q And I show you Plaintiff's Exhibit 39. Was there sufficient time to mail this through the United States Post Office?
A It was made up on the 7th, and we were telling them about a meeting of the candidates on the 10th. I don't [252] think there would be enough time.
Q Was there sufficient time to mail through the United States Postal Service, Plaintiff's Exhibit 38, pertaining to sewers?
A No, there wasn't.
Q That was the issue that you previously testified to?
A That's the one that I was talking about, yes.
Q I show you Plaintiff's Exhibit 40.
Was there sufficient time to mail that through the United States Postal Service in the ordinary course of the mails?
A No. It was the town meeting on the 13th, and this was the 9th. No, I don't think it would be.
Q Are these newsletters to which you have just referred—are these routine newsletters or are they out of the ordinary, that is, based upon your ten-years' experience?
A I would say that they are regular newsletters. Perhaps this one was a special one.

Q That pertains to the sewers?
A Yes.
Q Exhibit No. —
A 38.
[253] Q I see.
Now, Ms. Wildermann, does your association rely on its newsletters in terms of communicating with its constituents?
A Yes.
Q And how do you communicate with new people in the community?
A The same way.
Q Do you have an opinion as to what would be the effect on the operation of your civic association if you were not able to distribute the newsletter?
A Oh, we wouldn't be able to get in touch with people because we couldn't afford it.
Q And would you be able to use the United States mails as an alternative?
A Well, I don't think we would have the money to pay for the mails.
Q Can you tell us what your—I believe you stated your family dues are $2 per family?
A Yes.
Q Is that correct?
THE COURT: That's right.
A Yes.
Q Now, Ms. Wildermann, do you cover only the dues [254] payers in your community?
A No, we don't.
Q Approximately how many pay dues, on an annual basis?
A Well, approximately about 160.
Q And you distribute to the entire 300—
A Yes.
Q —some-odd family members?
A Yes.

Q And do the people who distribute—are they paid or are they volunteers?

A No, they are volunteers.

Q Do you have any knowledge as to whether most of these people work?

A Yes.

Q Have full-time jobs?

A Yes.

Q Well, what is your opinion?

A I'll say out of some—you mean how many would I think?

Q Yes, approximately.

A I'd say out of 20, I would say half of them work full time.

* * * * *

[258] Do you have an opinion?

THE WITNESS: An opinion concerning whether it would be feasible to get these out otherwise?

THE COURT: Yes.

BY MR. HAMMER:

Q Do you have an opinion? Yes or no?

A I have an opinion, yes.

Q Okay.

Can you tell us what that opinion is?

A My opinion is that we wouldn't be able to get these letters out to all of the people if they were not hand delivered.

* * * * *

ALVIN F. LAMDEN

DIRECT EXAMINATION

* * * * *

[265] Q And would you briefly describe your duties and responsibilities in the field as opposed to inspector?

A Yes.

Mainly I investigated criminal violations of postal law; in particular violations of the mail fraud statute and also violations of the private express statutes.

Q And before you were a postal inspector, what did you do?

A I was an officer in the United States Air Force.

Q Did you have any particular area of concentration there?

A Yes, particularly in the area of security and law enforcement.

Q Are you familiar with 18 U.S.C. Section 1725, which is the subject matter of this litigation?

A Yes, I am.

Q What role, if any, does Section 1725 play with respect to the enforcement of the private express statutes?

A Well, in the enforcement of Section 1725, when material not containing postage may be brought back to the [266] Post Office and after a negotiation may lead to an investigation into violations of Section 1725, it could also lead to violations of—an investigation into violations of the private express statute as well.

Q By the way, Mr. Lamden, are you an author of any learned treatise with respect to investigation of private express statutes?

A Well, I wrote the instructions for the Inspection Service confidential field manual and confidential management manual regarding the investigation of private express statute violations.

MS. DALY: Your Honor, merely to facilitate Mr. Lamden's testimony, I will hand to counsel and to the Court copies of the statute about which Mr. Lamden has been testifying.

THE COURT: All right.

Q During the course of your employment as a Postal Inspector, Mr. Lamden, have you had occasion to become familiar with Sections 3005 and 3007 of Title 39, United States Code?

A Yes, I have.

* * * * *

[280] Q And if this material was placed in a letter box without postage, would this mechanism be available to the owner of the letter box?

A No, it would not.

MS. DALY: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. HAMMER:

Q Mr. Lamden, the blatant examples to which you referred, those were all commercial examples, were they not, people trying to obtain money or run some type of commercial operation?

A Appears to be, yes.

Q There were no civic organizations, were there?

A In this material?

Q Well, in the blatant examples that you cited to us.

A No, there weren't.

* * * * *

[284] Q That's a felony section, is it not?

A Yes.

Q And that would be if somebody went up to a mailbox, a home-owner mailbox, and took out a check or a piece of mail, that would come within that section, would it not?

A Yes.

MR. HAMMER: I'd like to have my question answered if the Court will overrule the objection, your Honor. I think it's relevant at this point.

THE COURT: Well, all right. We will have his opinion for whatever the Court concludes later it may be worth.

Do you understand the question?

THE WITNESS: Can he repeat it?

THE COURT: The question is this:

In your opinion, does the approach to a mailbox of someone who is not in a mailman's uniform excite suspicion?

THE WITNESS: In certain areas, in certain situations, yes, it does.

THE COURT: What do you mean by certain areas and certain situations?

THE WITNESS: Well, certain areas that I can [285] think of immediately in my experience in Boston and even locally, there are certain areas in the South Bronx maybe on the days that welfare checks are delivered when anyone who is not in uniform, is loitering around a mailbox, or simply approaches it, would definitely excite suspicion.

THE COURT: Particularly if he has a hammer and a screwdriver in his hand?

THE WITNESS: Yes, your Honor.

Q Well, is it your opinion, then, that everybody should be—in order to prevent against that possibility in Boston or in the South Bronx—everybody not wearing a uniform or a postal uniform should be prohibited from having physical access to the vicinity of a mailbox?

MS. DALY: Objection, your Honor.

THE COURT: That's obviously not so because the proprietor of a mailbox has got to get access to it to get his mail out.

Q Mr. Lamden, some people, in addition to a—or in lieu of a mailbox, a receptacle, have a slide slot in their front door.

Are you familiar with those?

A Yes.

* * * * *

[291] Q Do you believe, Mr. Lamden, that people using the mailboxes for fraudulent criminal purposes, whether it is theft from a mailbox or a mail fraud scheme, frequently pose as a canvasser or solicitor and that's how they cover their other activities, their criminal activities; do you believe that?

A Could you please define "solicitor"?

Q Somebody who goes up to a home and either asks for money or makes a presentation and says, "We have

a perpetual motion machine that we would like you to buy," or I'm here to sell a device—a Fuller Brush Man, for example.

Do you believe that some of these criminal activities that you investigate, people pose in this type of [292] capacity?

A I have had that experience.

Q So your answer is yes?

A I said yes.

Q Now, have you ever considered the fact that some of these people who are going up to homes as canvassers or solicitors may in fact be members of a society just spreading their ideas in the spirit of the First Amendment?

MS. DALY: Objection, your Honor.

THE COURT: Sustained.

You are asking him to speculate.

BY MR. HAMMER:

Q Do you believe that people purporting to use the mailbox for any of these—I'll withdraw that.

Do you believe that people who may be approaching a home for some criminal activity, frequently use the mailbox in terms of their desire to case the premises, make an effort to make it appear as if they are depositing mail when they are in fact engaged in some criminal activity? Do you believe that?

MS. DALY: Objection, your Honor.

THE COURT: Sustained.

Q Now, are you concerned with the security of [293] the mail in the mailboxes?

A Yes, I am.

Q And do you believe that the mail in the mailboxes would be more secure if people were precluded from approaching the vicinity of the mailbox?

MS. DALY: Objection, your Honor.

THE COURT: I don't see where there is anything in his experience that would qualify him to express that

opinion any more than anyone else would be qualified to express that opinion.

You have had to do with theft of mailboxes at some time or other?

THE WITNESS: Limited experience, your Honor.

THE COURT: Is there anything in your experience that would, in your view, qualify you to express an opinion as to whether or not there is a greater hazard of theft of mail from mailboxes if people not in uniform are permitted, as a more or less routine practice, to approach mailboxes?

THE WITNESS: In certain areas I would say yes.

MR. HAMMER: Is he permitted to answer the question?

THE COURT: In certain areas he would say yes, [294] it would increase the hazard of theft.

And those areas are, I take it, lower socio-economic areas?

THE WITNESS: Yes, your Honor. But also I'm thinking of certain people who would have access to the boxes and even have a legitimate purpose in mind but be exposed to seeing contents of a mailbox, like, for instance, checks and so forth, especially personal knowledge of juveniles who are exposed to that may be in a very affluent area and would hamper the security of the mails.

Q So what you are saying is that you really can't make any distinction as to who should be permitted in the mailbox area or who should not be, isn't that correct?

A Could you define "mailbox areas"?

Q Well, physically within a few feet of the mailbox receptacle.

You can't make any distinction between one area of the country or the community and another area. It depends on the predilection of the particular person; isn't that correct?

A Well, again I'd have to qualify my answer.

* * * * *

[300] Q Based upon your experience in connection with these statutes, is 18 U.S.C., Section 1725 utilized as an investigatory tool in the enforcement of all or any of these statutes?

MS. DALY: Objection, your Honor.

He said he had limited experience.

I think that before he can answer that question, we ought to know whether there was any basis for asking it to him.

THE COURT: Well, I'll permit him to answer.

I think that's a minor concession to the brevity of life.

THE WITNESS: Could you repeat the question?

(Record read)

THE COURT: An investigatory tool?

MR. HAMMER: Yes, your Honor.

THE COURT: All right.

Let me ask you this:

During the time that you were enforcing these other statutes, including theft from mailboxes, obstruction of mail, et cetera, did it ever occur to you that Section 1725 had any relevance to what you were doing?

THE WITNESS: Yes, it did, your Honor.

[301] THE COURT: All right. And what relevance did you think it had?

THE WITNESS: I think it greatly aided in the enforcement of prevention of violations under these other statutes.

THE COURT: All right.

BY MR. HAMMER:

Q All of them?

A Yes.

Q Are there any other statutes that it aids in the prevention of violations under, other than the ones you have testified to on direct examination?

A Well, the private express statutes.

Q Now, are you aware of the extent to which 18 U.S.C. Section 1725 has been violated over the years?

MS. DALY: Objection, your Honor.

THE COURT: Well, he can testify from his own experience.

Q. Are you aware of that?

A I'm aware of the extent to which it has been investigated.

* * * * *

[306] A Well, a small number.

Q Approximately.

A Personally, approximately ten.

Q Ten?

A Yes.

Q And have any of those—

MR. HAMMER: Strike that.

Q And, based upon those ten personal investigations, Mr. Lamden, you are giving your opinion as to the desirability and need for the enforcement of this section; correct?

A Are you talking about violations of Section 1725?

Q That's correct.

A Yes.

Q And have any of these ten been civic association representatives?

A No.

Q Have any of them been noncommercial?

A No.

Q Have they been political, for example?

A No.

Q I'm sorry. I probably interrupted you.

A No.

[307] Q Have any of them been noncommercial?

A No, they haven't.

Q They have all been commercial?

A Yes.

MR. HAMMER: No further questions, your Honor.

REDIRECT EXAMINATION

BY MS. DALY:

Q Mr. Lamden, roughly speaking, how many investigations have you conducted under Sections 3005, 3007, 1341 and 1342?

A Maybe a couple of hundred or more.

Q For each of those statutes?

A Well, a lot of them interrelate. Most of my experience was in that area in the Boston division.

MS. DALY: I have no further questions.

MR. HAMMER: One further question.

RECROSS-EXAMINATION

BY MR. HAMMER:

Q In connection with any of these two to three hundred investigations of these further sections—and you stated they all interrelate—did any of them interrelate with 18 USC, Section 1725?

A No.

* * * * *

MARY PATRICK

DIRECT EXAMINATION

[309] Q Mrs. Patrick, where do you reside?

A I live in the Borough of Milstone in Somerset County, New Jersey.

Q How long have you resided there?

A Twenty years.

Q Can you tell me what civic functions you have performed over the years and what position, if any, you hold now?

A Yes. I am presently the Mayor of Milstone. I have served on numerous boards, among them the Board of Health, the Planning Board, the Recreation Commission.

Q Can you just briefly tell us something about Milstone, in terms of its population, its geography, how long

it has been in existence, and generally the nature of the community?

A Yes.

Milstone is a historic community. It dates [310] back to pre-Revolutionary days. It is a community presently of under seven hundred people, about 170 homes, which hasn't changed. It is considered a village. We call it the Village of Milstone.

Q What is its approximate size?

A It's less than a square mile.

Q And can you tell us—you are the mayor.

Is there a council?

A Yes, there are seven members to the council. It's the mayor's council.

Q Are you paid as mayor?

A No.

Q Are any members of the council paid?

A No, they are not.

Q Can you tell us, what services does the municipality provide?

A Well, we provide garbage services.

Q Do you provide school district services or—

A Yes.

Q —police service?

A We are a sending district. We send our children to Hillsboro Township.

Q In other words, you have to pay this other township?

[311] A Yes.

Q And do you have a police force?

A No, we do not. I am the police chief.

Q And you have been out there directing traffic as the police chief in the gas crisis, have you not?

A As a matter of fact, recently, yes.

Q For which you didn't receive any compensation?

A That's correct.

Q Now, can you tell us what is the municipal tax rate, in terms of dollars, for the Village of Milstone?

A Yes.

It's about $4.49. I say it is "about" because we haven't received our communication from the accountant.

Q $4.49?

A Yes.

Q Well, let me rephrase that question.

What taxes does your municipality charge against its citizens—for 1979, for example?

A I have with me—I'm not—I have with me Milstone's budget. I think that could probably—

THE COURT: He means what types of taxes.

There is a village tax that's assessed against property?

THE WITNESS: Yes.

[312] THE COURT: And the rate is $4.49 a thousand dollars of assessed valuation?

THE WITNESS: That's correct.

THE COURT: All right.

Q And does Milstone, in the course of its annual operation, distribute a newsletter to its presidents?

A Yes, we do.

Q How often?

A Well, we do it at least three time a year.

Q And is it ever more frequent than that?

A Yes.

Generally communications come out once a month, but the newsletter is such which is—

Q Well, then perhaps I misspoke.

Can you tell me how many times a year you distribute your newsletter?

A Yes.

It's about once a month, at least once a month, unless something comes up.

Q And you referred to other communications.

What other communications are there?

A Well, in the event there is an important meeting about to occur on the council level, the Board of Freehold, that affects Milstone, we try to get notice to [313] the people so that we can be in attendance at that meeting in force.

Q And this is in addition to its monthly newsletter

A Yes.

Q Does Milstone have its own local newspaper that covers you village?

A No, we don't.

Q Does it have its own post office?

A No, we do not.

Q What do these newsletters or notices consist of physically, in terms of how many sheets? What is the size?

A It's generally one sheet and perhaps both sides, depending.

Q And how long has Milstone been distributing this monthly newsletter?

A Well, I can say as long as I've been there, twenty years. It was the mode of communications before that, since it's a village and it's the only way we can reach our people.

Q How long has Milstone been a village?

A Well, it's been in existence since 16—about 1680.

Q And these newsletters during the period of [314] your tenure in the village, how have they been distributed to the citizenry?

A Generally through the mailboxes. We slip them in the mailboxes.

Q Is there postage affixed to—

A No.

Q Who slips them in the mailboxes?

A Generally an official of the town. Either myself or the council members.

Q You, yourself, have done it—

A Yes.

Q —on occasions?

A Yes, I have.

Q And is anybody paid for this distribution?

A No.

Q Now, during this approximate period of twenty years in which you have been involved in this, have you ever received any complaints from any of the citizenry as to this type of method of distribution?

A No.

Q Do you have an opinion as to whether people in the community have come to expect this type of distribution in this manner?

Do you have an opinion?

[315] A Yes.

Q What is that opinion?

A Well, I can say surely that there have been occasions when we did not send a newsletter out, and I have received calls asking what happened to the newsletter.

Q Well, based upon those facts, what is your opinion as to the expectations of people?

A They do expect it.

Q And where do they expect to receive it?

A Where we generally place it: in the mailbox.

Q And during the course of these distributions, have you ever filled up a mailbox to its capacity?

A No, we don't have—

Q What type of mailboxes are they, physically?

A Well, I think they're—

Q Well, let me rephrase that.

Are they attached to the home or are they rural-type boxes on a post?

A Yes, they are generally at the curb site.

Q At the curb site?

A Yes.

There is no affixed-to-the-house mailboxes.

Q So that when you distribute these in mailboxes, do people walk along the streets putting them in mailboxes?

[316] A Yes.

If it's raining, in many cases we drive and the kids put them in, but under constant supervision.

Q And your regular mail that you receive in these receptacles, are those distributed to the post office, and do they do it by hand or truck, vehicle?

A By truck.

Q Now, the people who make distributions, the members of the council, do these people work full-time for the village?

A No, we don't have any full-time employees.

Q Do these people on the council—do they have full-time jobs?

A Yes, we all—

Q Do you have a full-time job?

A Yes, I do.

Q And can you tell us what is the 1978 annual postage allocation in the borough—in the village clerk's office, approximately?

A I—

Q As best as you can recall it.

A Her salary is about $2,500, and her expenses—

Q Well, just for postage.

A We don't have a postage.

[317] Q You have no allocation for her to mail anything?

A No.

Q And is it practical, in terms of your experience and based upon your experience—would it be practical for the village to mail these monthly newsletters?

A No.

It—if I can respond?

Q Yes.

A In a word, no.

Q Would it be feasible to raise taxes to—

A Absolutely not.

Q —to cover this?

A Absolutely not.

Q Why not?

A Well, because we don't do things like that in Milstone. We carry things to the county level rather than mail. We present things personally rather than mail.

THE COURT: Well, what is your approximate total budget?

THE WITNESS: Our budget is about $2,500.

THE COURT: $2,500?

THE WITNESS: $250,000; I'm sorry.

THE COURT: $250,000?

THE WITNESS: Yes.

* * * * *

[320] Q Are the tax bills mailed out?

A They are mailed out by the county. We don't mail those.

Q I see.

THE COURT: Let me ask you this:

Do you have a list of the home owners or residents of the community, a mailing list?

THE WITNESS: Yes, I do.

THE COURT: You do?

THE WITNESS: Yes.

That's generally the voting list that the county provides.

THE COURT: Do you have those set up on addressograph plates so that you can address envelopes fairly quickly?

THE WITNESS: We do not.

THE COURT: You do not have that?

THE WITNESS: No.

THE COURT: Okay.

Thank you.

Q Now, have you ever made any effort to leave any of these newsletters on the steps or affixed to the door of any of the homes?

[321] A Yes.

Q And have you had any—what results have you had with respect to that type of delivery?

A Well, it's proven on occasion that either the wind might blow it away, or we can't put them in the door

since they have storm doors now that is a tight seal so that you can't slip it in.

So that the safest place is a mailbox.

Q Now, if you were required to mail through the United States Postal Service, what would be the impact on the community?

A Well, one, it would boost our costs considerably.

Q Would you have to raise additional taxes?

A Well, I would say so.

Q What would be any other—would there be any other effect?

A Well, I—yes.

I think that it would upset the people.

Q In what way?

A Well, they—you know, in the course of delivering the mail, we generally meet people. If they happen to be outside, we hand the communique to them. But they look for that kind of—we're a very small town. We have been doing business this way for so long that [322] it just seems a way of life. It's a part of our life.

Q Is there much turnover in this community? That is, in terms of new people coming into it?

A No.

The only turnover would be the university people. We are located between Princeton and New Brunswick, which would be Rutgers and Princeton.

Q I see.

Now, in November of 1978, Mrs. Patrick, did you receive any notification from the post office regarding mail delivery or regarding distribution in home owner mailboxes?

A Yes, we did.

Q And what type of notification did you receive?

A Well, they wrote us a letter telling us that they were going to charge us so much money for the mail that they said they found in the boxes.

Q Do you have a copy of that letter?

A You can have that.

I think this is another of the same type.

Q When did you receive the notification first from the post office?

A Last—in '78.

* * * * *

LEON DAVIDSON

DIRECT EXAMINATION

* * * * *

[334] Q What is the dues structure?

A Essentially it's $2.50 per person, per adult; $5 per family. But we are a little loose on the requirements.

Q And does the Association have a newsletter?

A Yes.

We set one up on a regular basis after I became president.

Q 197—?

A About 1974. Something like that.

Q And has it continued on a regular basis since that time?

A Essentially, three, sometimes four issues a year.

Q And what does the paper generally cover? What types of issues?

Without getting into the details of each; just the general areas.

A Well, areas of civic concern—traffic, police protection, taxes, urban renewal, sidewalk cleanliness; things of that type. I can go on, but that may be enough.

Q No, I think that's sufficient.

A Okay.

Q Can you tell us what your average checking [335] account balance is—or, better yet, what it is now?

A I can't give you an exact figure, but it's approximately ranging between two and four hundred dollars.

After a big dues drive, it would be up toward 400, and then it would drop down toward 200 or sometimes 100.

Q And during the course of your activities in the Civic Association, did you ever have occasion to speak to any representatives of the U.S. Postal Service regarding third-class mailing privileges? And, if so—Did you or did you not? Yes or no?

A Yes.

Q Can you tell us when that was, approximately?

A Well, the occasion that most recently took place was in trying to establish whether we could qualify for a nonprofit, low rate of postage payment, because we had gotten a warning from the postmaster in White Plains that we should not continue to distribute things through the mailboxes.

Q And what were you advised?

A I was sent a copy of the regulation which clearly shows that civic associations are not allowed to qualify for a nonprofit, low-rate, bulk mailing, but must take the regular commercial rate of about 9 or 10 cents a [336] letter.

Q Did you have any telephone conversation with any postal representative?

A I spoke to someone in the office. I guess they may call it the superintendent of mails, not the postmaster's office itself. I'm not sure of the name.

Q Where.

A In White Plains.

Q And were you advised?

A I was told that the regulations that were sent to me were self-explanatory, essentially. And they clearly said that they were not eligible, so I did not pursue it any further.

Q Now, during the course of your distributions of this newsletter, can you tell us whether they were hand-deposited in mailboxes without postage, or whether they were mailed through the U.S. Postal Service?

A Okay.

Our practice is always to mail first-class, sealed letters containing our newsletters to our dues-paying members.

Since we can afford to do that—they pay us $5 a year, and we can afford to do that.

However, to cover the rest of the residents in our area who are not dues-paying members, we deliver [337] fliers door to door, sometimes covering the same person twice, but that's a small price to pay for efficiency.

Q Does the Civic Association represent the entire community or just the dues payers?

A Well, we represent the entire community, because sometimes people will be dues payers one year and not the next year, depending on what their current bankbook is like, and the current interests in the area are.

Q Does the Civic Association in the course of its activities ever lobby for legislation?

A Not in the sense that I construe those words.

We have tried to get the civic—the common council in White Plains to vote one way or another about taxes and bond issues, things of that type. But I don't call that legislature.

Q Have you proposed local laws for consideration by the common council?

A We did fight a proposal for a new charter for White Plains; things of that type.

Q Have you been involved in public meetings on behalf of the Association in either speaking for or against proposed legislation in the common council?

A The word "legislation" I find difficult. Everything is ordinance at the level of common council.

* * * * *

[340] Q The local governing board?

A It is yes, under the laws of the State of New York.

Q And does the White Plains common council distribute an agenda before the meeting?

A "Distribute" is the wrong word.

It prints one and has it available at city hall, if you go down to pick one up.

Q And when—

A Usually it's prepared on the Thursday before the Monday meeting, and is available on Friday, if one can get into White Plains during working hours and get it.

Q Have issues ever come up that have appeared on the agenda that you received on Friday for the Monday meeting?

A Well, certainly issues have come up, some of which we have been concerned with.

Q And with respect to these issues in regard to which Highlands has been concerned, is there time to mail a notice to the community to attend the meeting?

A If there was an issue which we had to get the people alerted to, it would be very difficult under such a condition to get things run off, mailed and delivered. [341] We could possibly do it by directly taking them to the post office, putting first class mail on them and hope that they were delivered Monday before the people come home from work and can read them in time for the Monday meeting. But it would be fairly a close call to try to accomplish that.

Q And that would be with respect to the entire thousand membership; is that correct?

A Or even the 200 dues-paying members. To try to get a mailing that they would read in time to get to the 8:00 o'clock meeting on Monday night—considering that many people are commuters and so on—it would be very hard to deliver through the mails.

Q Have you ever received any complaints from anybody in White Plains as to this method of distribution in home-owner mailboxes?

A Only from the post office, as mentioned in this letter before.

Q And have you, personally, delivered in this manner, Mr. Davidson?

A For many years, yes.

Q And have you ever filled up a box or caused it to overflow?

A Well—no.

* * * * *

[344] When I was first president and postage rates were much lower than they are now—and that's not such a long time—we kept our lapsed members essentially for three years on the mailing list, you know, hoping that they would come back to life. And so we got good coverage that way.

But as the postage rates inched up, we kept cutting back on our lapsed-member list down to paring it as closely as we can. Now we are essentially throwing them out after one year and losing some members that way.

Q So you do not mail to any of the lapsed members; is that correct?

A I can't say that under oath that we don't mail to any of them. I will say that we are trimming the list as closely as we can.

THE COURT: But you are mailing now?

THE WITNESS: We are mailing to all our dues-paying members as such. The ones that are on our registered membership roll, we always mail to them as a requirement. It's even in our constitution that we notify the members seven days ahead of meetings, and so on.

Q Now, Mr. Davidson, during the course of your residence in White Plains, can you tell us whether political candidates have customarily deposited in this manner—[345] that is, in home-owner mailboxes, without postage?

A That's correct.

During election campaigns we often find material from the various candidates, small fliers, yes.

Q And has this become an accepted practice in the community?

MS. DALY: Objection, your Honor.

THE COURT: Sustained.

Q Have you ever heard any objections interposed to this procedure?

MS. DALY: Objection.

THE COURT: Well, I'll permit it for what it's worth. I'm not sure he is in a position to hear complaints about that sort of thing.

Q Well, in the Civic Association activities, have you ever heard any complaints about political candidates depositing in this manner?

A I have not heard complaints.

The only time it would have been discussed is when we discussed them from the fact that the postmaster wanted us to stamp our fliers, and we discussed the question, well, things do get put in mailboxes * * *

* * * * *

[349] Q Based upon these years of experience, do you have an opinion as to whether or not hand-deposit to your Civic group of your newsletter is the only effective way of communicating with the constituents? Do you have an opinion?

A I have an opinion.

Q What is your opinion?

MS. DALY: Objection, your Honor.

THE COURT: Well, I will receive it.

A My opinion is that it's fundamental to the operation of an association like ours to be able to hand fliers out in the neighborhood, at each person's place of residence. And as has been certainly evidenced many times here already, and in my affidavit, the only practical way is to put them in the mailbox. There seemed to be no real problem with it.

Q Do you have an opinion as to whether there is an effective, practical alternative to this method?

Do you have an opinion as to whether there is?

A I have an opinion.

Q What is that opinion?

A The opinion is there is really no alternative [350] for this type of association.

MR. HAMMER: Thank you.

No further questions of Mr. Davidson, your Honor.

May I have a moment, your Honor?

THE COURT: Yes.

(Pause)

MR. HAMMER: Your Honor, at this time I would like to offer Plaintiffs' Exhibits 43, 44 and 45 in evidence.

MS. DALY: No objection.

(Plaintiffs' Exhibits Nos. 43, 44 and 45 received in evidence.)

CROSS-EXAMINATION

BY MS. DALY:

Q I would ask you to look at Plaintiffs' Exhibits 44 and 45, sir, if you would.

A Yes.

Q And ask you if you can tell me when those were distributed.

A All right.

Exhibit 45, which is dated June 10, 1977, and refers to a public meeting on June 15, would probably have been distributed in the few weeks before June 15; possibly the same week. * * *

* * * * *

JOHN M. NOLAN

DIRECT EXAMINATION

* * * * *

[382] Q If you would explain to the Court.

THE COURT: I have an easier solution to this. Leave it there. I'm sure the plaintiffs would be happy with that.

MS. DALY: I have an easy solution for them, too, your Honor, but they don't want my easy solution.

THE COURT: Let me hear why it would be done to maintain the pristine nature of the box.

THE WITNESS: Well, when a carrier approaches a mailbox with the mail, he has several duties. No. 1, obviously to deliver the mail.

No. 2, if there is any mail that has been placed in the box by the customer, by the resident with a stamp on it for mailing, he must in fact remove that piece of material, check the box to see if there was any live mail, so to speak, in the box, and finally as a protection of our private expressed statutes, if there is anything in the box without postage on it, we have no knowledge of whether it's from a civic association, police department or a private mailer. The carriers are instructed to look at it and remove it if it doesn't have a stamp.

* * * * *

[386] * * * We keep them in separate bundles. If there were merchandise samples or whatever, there might be a third bundle. But essentially day in and day out, two bundles.

So when a carrier arrives at a—whether he is walking or riding—what he's to do is to get the letter mail for a particular destination and flat mail for a destination, lay the letter mail inside and wrap the flat around it, unless the flat says "Don't bend," in which case he would try to comply.

Q Now, Mr. Nolan, as a result of the Time/Motion Studies, has it been determined how long it takes to insert mail similar to that which you just bundled in a letterbox similar to Government's Exhibit S?

MR. HAMMER: Objection, your Honor.

THE COURT: I didn't hear the question.

Read the first part of it again, please.

(Record read.)

THE COURT: Why don't you offer the Time/Motion Study? Wouldn't that be the best evidence?

MS. DALY: Your Honor, it's a highly complicated document which the Postal Service would prefer to have for reasons of union problems—would prefer not to have to [387] introduce it into evidence.

This is just about the end of the testimony. I just want to establish the number of seconds that it takes.

THE COURT: That doesn't make it admissible.

MS. DALY: Yes, sir.

THE COURT: What's the nature of your objection?

MR. HAMMER: Well, your Honor, my objection is that I don't think this witness is really qualified to state the nature of this study, how it was conducted, what it found. He's basing this on information provided him by others.

There is no way we can cross examine him on it. It's hearsay.

I can't see the relevance of it.

THE COURT: Well, particularly because the studies aren't going to be introduced into evidence, we have not only the hearsay objection, which we might somehow get around, but we have got also the best evidence objection. He's going to characterize the contents as hearsay evidence.

MS. DALY: Your Honor, all he's going to do—

THE COURT: Which makes it doubly objectionable.

MS. DALY: —is to say how long, by virtue of Time/Motion Studies, it takes to insert that bundle into [388] that letterbox.

He's fully familiar with the study. He's already told us that.

MR. HAMMER: Your Honor—

THE COURT: Are you talking about just inserting or what are you talking about?

MS. DALY: Just inserting.

THE COURT: Just inserting?

MS. DALY: That's right.

MR. HAMMER: Your Honor, why do we need a complicated Time/Motion Study, when he can go over there and put something in it?

THE COURT: Why don't you have him demonstrate?

MS. DALY: I'll be glad to have him demonstrate.

If somebody has a stopwatch or a watch with a second hand.

THE COURT: Go ahead. Don't start until he gets to that mailbox.

MR. LA ROSE: I have one.

THE COURT: That mailbox is precariously balanced on top. Now it will be held securely.

All right.

THE WITNESS: The carrier approaches the box—

THE COURT: From the time he puts his hand on [389] it, then you start timing.

MR. LA ROSE: Okay.

THE WITNESS: That's it.

MR. LA ROSE: A little over five seconds, your Honor.

THE COURT: Over five seconds?

MR. LA ROSE: Yes, sir.

THE WITNESS: I can work on that.

THE COURT: I think you can.

I don't think all of the postmen are quite that hesitant or perhaps even arthritic. Try again. Let's see if you can't beat that time.

THE WITNESS: Yes, sir.

THE COURT: All right.

MS. DALY: Are you ready?

MR. LA ROSE: Yes.

MS. DALY: Go.

MR. LA ROSE: Four, your Honor.

THE COURT: All right, four seconds.

Now, let's put a piece of—one of these fliers in there and see what happens.

MS. DALY: Your Honor, how did you ever guess?

How about Plaintiffs' Exhibit 1?

THE COURT: I'm a master of trivia.

[390] MS. DALY: Thank you.

MR. HAMMER: It would seem to me, your Honor, that an experienced civic representative would probably do it much faster than a U.S. Postal Service employee.

THE COURT: Yes, I think he's been on the desk too long. All right, try again now with another piece in there that he's got to take out and look at.

MS. DALY: Plaintiff's Exhibit 22.

THE COURT: Okay.

MS. DALY: Fold it as they testified it was folded, and place it in the letterbox.

MR. LA ROSE: Not too far back.

MS. DALY: You will notice that it kind of folds over and goes down. Close the letterbox. Go to it.

THE COURT: All right.

MS. DALY: Go.

MR. LA ROSE: About seven seconds, your Honor.

THE COURT: Seven seconds?

MR. LA ROSE: About that, yes.

THE COURT: All right.

MS. DALY: A bout [sic] three additional seconds.

THE COURT: All right.

MR. HAMMER: Well, your Honor, may we have the record reflect that part of those three seconds were consumed [391] while he was looking at this notice and while he—

THE COURT: Well, he had to look at it to make sure it wasn't stamped by the occupant to go somewhere else to be picked up. I think his performance was—

MR. HAMMER: Admirable.

THE COURT: —was—yes—admirable, if not of olympic quality.

BY MS. DALY:

Q Based upon your experience, what factors, if any, would affect the three-second figure?

A The volume of mail going in that particular day, the size of the box, the amount of material that's already in the box.

Q Now, I show you what has been marked Government's Exhibit L for identification.

THE COURT: Incidentally, this doesn't necessarily have to be a part of the record, but how do you compare it with the Time/Motion Study?

THE WITNESS: Essentially the requirement to remove a piece of mail adds about 30 percent on the time. It takes us roughly four seconds, or 3.75 seconds, to remove that piece of mail from the mailbox and insert it. So I was pretty close.

* * * * *

[394] THE COURT: Is that for apartment houses?

THE WITNESS: Yes. That's the minimum.

Q Mr. Nolan, what is the average hourly rate for a Postal Service carrier, including fringe benefits?

A $11—

MR. HAMMER: Objection, your Honor.

THE COURT: Well, we're going to work out the arithmetic, I'm sure, to figure out what it's going to cost the government if the postmen have to tax X seconds at each postbox to look at the material contained therein.

MR. HAMMER: Well, how are they going to make that computation?

They have no way to knowing whether it's once a year he has to do this, twice a year.

THE COURT: I understand that gap in the equation. We'll have to see whether it gets filled.

Overruled.

A $11.33 an hour, including fringe benefits.

Q And at my direction, have you computed the approximate daily cost to the Postal Service of serving letterboxes in which one or more fliers identical to the plaintiff's exhibits have been inserted prior to the time that the carrier arrives at the letterbox with mail to be inserted therein?

[395] A Yes, I have.

Q I hand you what has been marked Government's Exhibit M for identification and I ask you if you can identify it.

A Yes.

That's the summary that I developed.

Q And would you tell the Court, briefly, what method of computation you followed or developed in order to determine the cost to the Postal Service?

A Yes.

Again with the $11.33 per hour salary and fringe benefits, figuring an average route of 400 deliveries per day, which again is equivalent to what we find in Greenburgh, what we assumed is that it takes four seconds to remove the material that's in the box and then place it—investigate it or glance at it, and then place the mail in the box.

What we have said, however, to be conservative, we have said that only 25 percent of the deliveries would be affected. Someone could have already picked up the flier, what have you. So we said essentially one second per delivery for the 400 deliveries.

Q But in your actual physical demonstration here, it took three seconds, did it not?

A Yes.

[396] The cost per route in Greenburgh would be about 6.7 minutes per day, or about $1.25.

In the whole of Greenburgh—and I don't know exactly how many carriers, but we have set 100 carriers—it would take 6.7 hours, or $76. In the northeast region the figures start to blow up, or 2300 hours or $27,000, and nationwide about $160,000.

MR. HAMMER: Your Honor, I'm going to ask that this testimony be stricken.

I believe that this survey, or whatever this is, your Honor, has been done in a totally ad hoc, informal way. There are absolutely no standards utilized. I don't believe it's as reliable, your Honor, as the questionnaire that we

utilized, which your Honor refused to admit in evidence, through civic associations.

The witness has testified he doesn't know how many carriers but we took 100, and we made a nice round number and took 6.7 minutes and make it 6.7 hours because it multiplied easily by 100.

MS. DALY: Your Honor, that's not what he said.

MR. HAMMER: I think this material is prejudicial, your Honor. There is absolutely not the slightest shred of foundation for this type of testimony.

THE COURT: Well, let me see the document.

* * * * *

[406] Q Mr. Nolan, can you just tell us, are there any postal regulations which would prohibit a homeowner from putting up a box such as the one that we have examined in these pictures or Government's Exhibit T?

A The postal regulations cover the letterbox itself and regulations as to what may or may not be put on the letterbox. It doesn't govern anything else.

Q Mr. Nolan, are you familiar with the way in which Section 1725, which is the subject matter of this lawsuit, is enforced?

A Yes, I am.

Q Would you explain to the Court the practices and procedures followed by the Postal Service in the enforcement of that statute?

A Well, it's the responsibility of every postmaster to insure that the statute is carried out. Essentially [407] the only practical means he has is by every carrier that delivers to every delivery point every day. And essentially, the requirement is for the carrier to remove the unstamped piece from the box and return it to the Post Office for action, or in the case of a blanket mailing, to take two samples of the piece and again return it to the Postmaster for action. It's the Postmaster that takes action on the matter.

Q And is the Postmaster's action necessarily recorded physically, or can his action be an oral one?

A It can be an oral one. From a practical standpoint, in smaller communities, more often than not, it is a verbal kind of request. But frequently it is documented. As a matter of fact, if any action is taken to recover money, it has to be documented.

Q Based upon your experience, would you tell us what happens if the Postmaster does not receive satisfaction following an oral or written communication and the individual or organization continues to distribute in violation of Section 1725?

A The correct procedure is for the Postmaster to notife [sic] the Rates and Classification Section of the region and also to notive [sic] the Inspection Service.

* * * * *

[415] By the same token, because we're a very large organization and in some cases our carriers don't always comply exactly with our regulations, to avoid notifying the Postmaster, some of them may just—don't bother with a flier that's in the box, and it may or may not—well, may or may not report it to the Postmaster.

Q But based upon your experience, do you have an opinion with a reasonable degree of certainty as to whether Section 1725 is being actively enforced by the Postal Service?

A Based on conversations I have had with postmasters in the recent past, not only here but in other parts of the country, over the last year or so, it's my opinion that it is being actively enforced.

* * * * *

CROSS EXAMINATION

* * * * *

[429] A Our standard is 24 hours from the time of receipt to the time of delivery.

Q Now, isn't it a fact that down in the Post Office in Mount Vernon, or in any Post Office, third-class mail is not handled until all first-class and prior mail is handled?

A No, that's not true.

Q That's not true?

A That is not true.

Q Well, that's the way they handle it in the Ardsley Post Office. Are you aware of that?

A I was not, but it's possible. But that's not true in all Post Offices.

Q But it may be true in some?

A That's correct.

Q There are different standards for different Post Offices?

A Not different standards; different operating practices.

Q Different customary operating procedures?

A Correct.

[430] Q Now, if the mailer goes to his Elmsford Post Office where he hypothetically has a bulk mailing permit—

A Yes.

Q —and he has a stack which says Elmsford and another stack which says White Plains—

A Yes.

Q —what happens to the White Plains ones?

A Again, if there is transportation between Elmsford and White Plains, the mail would go on the White Plains truck directly to White Plains.

Q What do you mean, if there is transportation?

A Well, I'm not sure exactly what time of day it is, whether there's direct transportation.

Q Well, is there generally direct transportation from one Post Office to the other, or only from the Post Office to the Mount Vernon-Yonkers central distribution center?

A It varies from office to office. Depending on the community of interest, whether there's a tie and a lot of local turnaround mail.

Q Well, is there a tie between Elmsford and White Plains?

A I don't know.

Q So you really can't tell us, can you? It varies [431] based on the customer?

A I really can't tell you what the transportation pattern is between Elmsford and White Plains.

Q Does it vary based on the need, the custom and the practice in the area?

A Yes, I would say that's fair.

Q And that would affect the delivery time?

A Yes.

Q Now, there's a $30 initial fee.

A 40.

Q Wasn't $40 the annual fee?

A Yes.

Q And isn't there an initial fee that you have to pay in addition?

A Not that I'm aware of.

Q $30?

A Not that I'm aware of.

Q And when you make a bulk mailing, isn't there a minimum 200 pieces that have to be put into a sack?

A In any time you mail, there must be 200 pieces minimum, that's correct.

Q In any segregated—

A No. 200 pieces in the whole mailing.

Q So that if there were—what if there are less [432] than 200 pieces?

A Well, then you couldn't—then you couldn't charge the—you couldn't get the bulk rate.

Q Well, let's use this: Suppose there are 199 pieces and the person has a bulk mail rate, can he mail his 199 pieces?

A From a practical standpoint, we're not going to trap that because we don't count every piece.

Q Suppose it's 190, can he mail them, or the Post Office—

A Technically speaking, he is not to mail at the bulk rate unless he has 200.

Q So in that case he would have to use the first-class rate; correct?

A Or the single-piece rate for third-class mail, correct.

Q Which would be what rate?

A It would be more expensive than first-class, so he would use the first-class rate.

Q I see.

* * * * *

[443] Q Well, isn't it a fact that people just customarily in rural areas leave, whether they're infirm or not, money in mailboxes for postage? Hasn't it become an accepted practice in some areas?

A In some areas, yes.

Q And what happens? The 15 cents is left in coin on the envelope and the postman takes it and he takes it back to the Post Office and he turns that 15 cents in and they put a stamp on it; is that correct?

A Or in some cases they ask to have stamps given to them. Yes, that's correct.

Q Okay. Now, is there anything in the regulations that permits that?

A No that I am aware of.

Q It's just an accepted practice over a number of years that has grown up?

A That's correct.

Q For the convenience of that particular community?

A Yes, to fill the needs of the community.

* * * * *

[469] Do you have an opinion on that? In your opinion, would the Post Office lose less or lose more money if it were carrying all of the mail that is now delivered by—or, all of the mailable matter that's now delivered by hand in the postboxes?

THE WITNESS: We would—it would help our cause because it would help carry our overhead. As long as we're walking up to the front door and we have just another piece of mail walking along, so to speak, with the carrier, that's going to help defray the cost to the front door or to the mailbox.

THE COURT: What about this extra sorting that has to go on?

THE WITNESS: The only extra sortation—for third-class-mail, again you're talking about a sortation down to at least the 5-digit level or the carrier level. I would think that it would help slightly cover the cost.

There are two points. If you're talking about special-rate organizations, 2.7 cents as opposed to 8.4 cents, obviously that's going to be more of a break-even kind of thing.

THE COURT: Well, at 8.4?

THE WITNESS: We're going to make money.

THE COURT: You're going to actually make money?

[470] THE WITNESS: Yes.

THE COURT: The cost of handling and sorting those extra pieces of mail is less than 8.4 cents?

THE WITNESS: Yes.

Because one thing you have to remember, your Honor. If, for example, what we call a saturation mailing which would hit almost every house on the street, as the civic association might, since all the people in there live in the area, although I'm not familiar with how they mail, then the carrier would not in fact sort the mail to each pigeonhole, he'd just carry that as a separate bundle and every house he would go up to, he would just grab another one and put it with the rest of the mail. So the only difference being instead of reaching for flats and letters, he'd reach for flats, letters and, while he's walking, the other flier.

Q Now, that assumes, of course, that all the civic fliers, if they were not deposited in the mailbox, would be mailed through the Postal Service; correct?

A Well, yes.

Q As opposed to not being sent at all?

A Right.

* * * * *

JAMES MICHAEL O'KANE

CROSS EXAMINATION

[476] Q Well, when they're put at the curb, does the deliveryman—

A He sits in the vehicle.

Q He goes from house to house in the vehicle?

A Yes.

Q He doesn't walk?

A Right.

You've got the walking routes where he walks the whole route. We have what you call a park and loop route, where he parks a vehicle, loops around several houses, comes back to the vehicle, drives to the next area.

The style of houses or the size of lots tend to be similar to a walking route.

Q Who decides that? The local postmaster?

A Yes, with review with the district and region.

Q I see.

Now, is the purpose of the rural box at the curb to avoid the postman having to get out and walk up to the front door of each house in order to save time and expense?

A Sure.

* * * * *

[531] A Again, I don't recall exactly when we were contracted to begin it. But you do need—you do need a considerable time to plan out where you are going to do it, can you use Greenburgh, can you use other communities?

Q Do you recall what the weather was like on the 16th?

A Yes. A typical day. It was not raining.

THE COURT: The weather was—

THE WITNESS: Nice weather.

THE COURT: —was good. All right.

Q Now, did you consider the possibility of scotch-taping the flyer to the door?

A No.

Q You didn't use that?

A No. We never thought of it, in fact.

Q And I assume based upon your utilization of this—of the prospective utilization of the plastic bag, that the weather is a factor?

A It would have been.

Q Well, is the weather a factor to consider in this type of thing?

A Oh, I would say yes.

Q And is the wind a factor to consider?

[532] A I would say no, unless you had gale force winds out there.

Q Well, suppose you had twenty miles an hour wind, you don't think that's a factor?

THE COURT: If you have if [sic] attached by a rubber band stapled to one edge of a single sheet, don't you think the wind might cause that to flap around and blow away?

THE WITNESS: It could be a factor, yes.

THE COURT: Let me see that sheet again with the rubber band stapled to it.

THE WITNESS: Yes, sir.

(Handing to the Court)

THE COURT: The sheet—

THE WITNESS: If you pull hard, it will come off.

THE COURT: Yes, I know. It won't take much of a pull to pull it away. The sheet is folded once.

THE WITNESS: Yes, sir.

THE COURT: And the rubber band is stapled in one corner of the folded sheet, that is, near the point of the fold, by a single staple which passes over the rubber band and through the two layers of the sheet.

* * * * *

[535] THE COURT: And approximately 12 percent of those in the mailbox were not found.

THE WITNESS: Well, you are right in two out of three. It's 29, 25 and 17. 17 percent that were placed in the mailbox were not found.

THE COURT: 17 percent?

THE WITNESS: Yes.

THE COURT: I read it not correctly. Oh, 26, 17 percent; correct. I read the wrong number. I was looking at the not read instead of not found.

THE WITNESS: Yes.

Q Doctor—

THE COURT: In other words—

MR. HAMMER: Excuse me.

THE COURT: —roughly half again as many, proportionately, were not found where the notice was placed on the doorknob or under the mat?

THE WITNESS: Yes, I would say less than half, but proportionately.

THE COURT: Well, half again as many were not found?

THE WITNESS: Yes.

THE COURT: Half again as many.

THE WITNESS: Yes.

* * * * *

[538] Q Now, you stated that you were given the right to call the post office and find out when was the delivery schedule so that you could deliver before the mail was delivered.

A Yes.

Q Correct?

A Yes.

Q Now, Professor, do you know whether civic associations are granted this right?

A I have no idea.

Q You didn't consider that in your report, the time of delivery?

A No.

I think just a simple call to the post office.

Q You didn't consider the time of delivery as being an effective consideration in your report?

A I would say it was a fairly crucial decision.

Q What if you have to deliver on a Sunday afternoon in the wintertime, would that affect your means of delivery?

[539] A The survey?

Q Would it affect the likelihood of receipt by using a particular mode of delivery?

A Yes.

Again, in my opinion, it probably would, by underestimating then the return rate from the mailbox. Some people don't go to their mailbox on a Sunday afternoon.

Q Well, what about reliability of delivery?

A I'm not sure of what you mean.

Q The likelihood of the item still being there when the person—

A On Monday?

Q On Monday, for example, Monday morning.

A Yes, I would see no reason why it wouldn't be, short of—

THE COURT: Well, his own figures show that you've got one and a half as many times of losing the mail if you put it somewhere other than the mailbox, and the ratio will go up as the length of time goes on.

Q You didn't give any consideration in your report, or you didn't have to, to the weather conditions on that day, did you?

A In the report, no.

* * * * *

CURTIS L. WOODARD

DIRECT EXAMINATION

* * * * *

[557] Q Well, are you familiar with Section 1725?

A Yes.

MS. DALY: I think he can answer.

MR HAMMER: I have the same objection, your Honor.

THE COURT: Yes.

We are only interested in whether the enforcement of Section 1725 reduces the hazard of mail fraud. And if so, how.

THE WITNESS: May I say, your Honor, to strike 1725 from the book will offer increased opportunity to these promoters. It will, by delivering handbills into neighborhood boxes—anybody's mailbox, business—it will offer them an opportunity to solicitate very little expense, and it will also obviate or bypass the controls of the mail fraud law.

I believe we will not be able to investigate them for what they are.

THE COURT: In other words, your Fraud Division doesn't come into action where material is placed in a mail box without postage on it?

THE WITNESS: Yes, sir.

It's not mail and doesn't invoke the umbrella of mail fraud if it's—now, at this point we [558] have a violation under 1725, and these promoters are very much aware of the postal inspectors. In some cases they try to avoid us.

But if the protection of 1725 is removed, that is to say, if it's legal to put their handbills in the mail boxes, then they will be able to avoid us on the mail fraud as well, because we—

THE COURT: Well, the real issue here is whether Section 1725 is too broad, whether it should proscribe all use of mailboxes for unstamped matter or whether it ought to prohibit only the use of mailboxes for fraudulent solicitation.

If it does the latter, it seems to me that, as far as enforcement is concerned against mail fraud, it would be just as effective as the present statute—even more so. Because if it provided, in effect, that anybody who used a mailbox for the delivery of a fraudulent solicitation

would be guilty of mail fraud to the same extent as if he sent it through the mail, then you are exposing these people to a felony prosecution instead of a misdemeanor prosecution with a maximum $300 fine.

THE WITNESS: Yes, your Honor.

* * * * *

[568] Is that your point, what the Judge just paraphrased?

THE WITNESS: About throwing out the babies with the bathwater?

THE COURT: That's not his point.

The point is that by preventing the use of mailboxes for unstamped mailable matter, you make fraud more difficult.

THE WITNESS: Yes, sir.

THE COURT: In two ways:

Number one, you make more expensive, and, number two, you force people to use the mail and expose them to the long arm of the postal inspection service.

THE WITNESS: Yes, sir.

MR HAMMER: Well, your Honor, I was just trying to save some cross-examination, and your Honor really pre-empted one of my questions.

I am just trying to see if the witness means that if you don't allow anybody to deposit in the mailbox, then you can eliminate the possibility of mail fraud.

Is that what your testimony indicates?

THE WITNESS: All right?

MR. HAMMER: Am I correct?

THE WITNESS: I am not contending that you are [569] going to eliminate mail fraud—

THE COURT: Well, cut down the risk of it?

THE WITNESS: Eliminating additional exposure to fraud and a possible haven for promoters to escape penalties of the mail fraud law.

MR. HAMMER: By preventing anybody from using the mailbox in this fashion?

THE WITNESS: Yes, sir.

That's one of the hazards that I see in it.

MR. HAMMER: Okay. Thank you very much.

THE COURT: I am sure that you will argue that a perfect anology [sic] for that would be that in order to prevent pornography, you prevent all literature.

BY MS. DALY:

Q Mr. Woodard, turning now to another topic.

Are you familiar with the collection procedures followed by the postal service for enforcement of Section 1725?

A Yes.

* * * * *

CROSS EXAMINATION

* * * * *

[579] I don't see where that has anything to fit in with his testimony.

MR. HAMMER: He has talked about—

THE COURT: Let me hear the question again, please. I didn't understand it.

(Record read)

THE COURT: Oh, you mean such as burglary?

MR. HAMMER: Such as burglary or some other criminal scheme.

Q Do you believe that that—

A I am hungup, if you please, on your word "solicitors."

If you are talking about people delivering handbills—

Q I am talking about people who solicit door to door, either to sell a Fuller brush or to sell a candidate or whatever activity they are involved in.

Do you believe that these people—

A Does that include delivering a handbill?

Q Yes.

A Yes.

Q Do you believe that they may be posing as—using this as a blind for other criminal activities? The answer is yes?

[580] THE COURT: You mean on occasion?

MR. HAMMER: Yes.

A It can be.

Q And have you ever considered that these people may be useful members of society, simply spreading their ideas?

MS. DALY: Objection, your Honor.

THE COURT: I don't think this is really within his area of expertise or his area of direct examination.

Q Do you believe—

MR. HAMMER: I will withdraw the question.

Q Do you believe the mail would be more secure if none of these people were allowed in the vicinity of the mailbox?

A I—

MS. DALY: Objection, your Honor.

He hasn't shown that any of those people—

THE COURT: He's about to help you out by saying absolutely.

Q You believe—

A Absolutely.

THE COURT: All right.

Q And so they should be prohibited from being in [581] the vicinity of the mailbox?

A Yes, sir.

Q Do you believe, based upon your experience, that homeowners, where these mailboxes are situated, wish to receive this material, non-post paid, in their mailbox?

MS DALY: Objection, your Honor.

THE COURT: Let me hear the question again, please.

(Record read)

THE COURT: Well, the problem is which material you are talking about.

If you are talking about material from a civic association—

MR. HAMMER: We will talk about civic material.

THE COURT: All right.

Q Do you believe they wish to receive it?

MS. DALY: Your Honor, his opinion is no better than, I would respectfully suggest, the rest of us.

THE COURT: Yes.

I don't think he's indicated any expertise there.

* * * * *

ALLAN R. BZIK

DIRECT EXAMINATION

* * * * *

[589] A Well, surveillance is one of the tools we use in our investigations. Primarily on known check-receipt days, we try to have inspectors in areas where we have established—we have notified we have been having losses of checks in mails.

Depending on the area and the type of surveillance to be conducted, the inspectors will probably be in a vehicle. The vehicle may be a regular law enforcement vehicle or some undercover vehicle such as an older van or something. We would have hopes of not drawing the suspicion of the local residents and try to keep our existence and our presence unknown at that time.

The inspectors would try to have a visual observation of the mailboxes in question.

Q Okay. And would you tell us, please, what happens after you observe someone pacing in a suspicious manner?

A Well, in all probability, the inspector or inspectors would exit the vehicle and approach that individual.

Q And if the individual gives an appropriate accounting of his or her behavior, what effect would this have on the surveillance?

A That would depend on the location of the [590] surveillance and the type done.

In most cases, I would say the surveillance would be void at that point, upon exiting the vehicle and approaching the suspect. The identity and the existence of the inspectors in the area would be known And to try to conduct a surveillance after that would probably be worthless.

Q By the way, is surveillance used in every investigation of mail theft?

A No, it isn't.

Q Could you give us a rough estimate about what percentage it might be used in?

A Well, once or twice a month on our heavy check delivery dates we try to have a physical surveillance being done.

Q Is your surveillance considered to be important as part of your investigation and your methods?

A Yes, it is.

Q Would you tell us please—withdrawn.

Are you familiar with Section 1725, which is the subject matter of this lawsuit?

A Yes, I am.

Q And based upon your experience, can you tell us what role, if any, does Section 1725 play with respect [591] to external theft investigation?

A Well, I feel without 1725, we would have many more people having access to the mailboxes or being in the vicinity of the mailboxes. This type of activity could hinder our surveillances in that we would not be sure if a person we see approaching a mailbox is a subject or has a legitimate reason for being there.

We also receive many phone calls from concerned citizens who may report that someone has been seen in the area of their mailboxes. We try to respond to the area if at all possible to determine who that individual may be.

We also receive assistance from the local police—anti-crime or street patrol units—who may be doing a similar type of surveillance as us, watching mailboxes, and they

would have a difficult time identifying who it is exactly going into mailboxes, who may be approaching them.

* * * * *

[599] THE COURT: Just how serious an interference with your surveillance do you think it would be if housewives or citizens were permitted access to a mailbox to drop in a notice of a meeting of a neighborhood association?

THE WITNESS: Well, I can't say it's going to be totally disastrous for our surveillances. It can only be a hindrance, I would assume.

In some areas it would be more of a hindrance than in others.

THE COURT: You were talking about the apartment house mailboxes.

THE WITNESS: Yes, sir.

THE COURT: Those are mainly of the kind where you have a key to get into the box; is that correct?

THE WITNESS: That's correct.

THE COURT: And if somebody is going to break into the box to get a government check out or to take something out or to see if a government check is there in the event there is no window in the box, he's going to have some kind of tool—a hammer, a chisel, a screwdriver, something—to force the box open, is he not?

* * * * *

ERIC MALM

DIRECT EXAMINATION

* * * * *

[607] A They are boxes out near the curb. There are no curbs actually. They are boxes out by the road.

Q They are rural-type boxes?

A Yes.

Q Okay.

What is the approximate treasury balance of your association?

A Theoretically, it is not supposed to be over $100.

Q Is that about what it is?

A I don't know what it is right now.

Q What are the family dues per family unit?

A Again theoretically, $2 a family per year. We don't always collect them.

Q How many families in the community in this association approximately?

A I would say about 170.

Q And approximately how many pay dues?

A Ninety to a hundred.

Q And based upon your experience in this community—I will withdraw that.

How long have you been involved in distributing in this manner?

[608] A Ten years.

Q And based upon your experience that you have described to us, have you ever received any complaints from any civic resident as to this manner of distribution?

A No.

Q And do you distribute only to dues payers?

A No.

Q You cover the entire community?

A Yes.

Q And how—

A All of the families in the Spring Brook Home Association.

Q What does the flyer physically consist of and how is it deposited?

A The flyer would normally consist of one to two pages of mimeographic or Xerox-type paper.

Q And how is it put into the box, Mr. Malm?

A The box would be opened and the flyer placed inside the mailbox.

Q Now, do people in the community customarily use the front door of their homes?

A I would say no.

Q Do people in your community customarily use some other door?

[609] A Yes.

Q And which door is that customarily?

A Usually a door through the garage or an entrance from the side.

Q And based upon your knowledge of the people in your neighborhood, approximately what percentage of people would you say use the side door as opposed to the front door?

A I—

Q If you can give us such a percentage or approximate percentage.

A I'd say almost all.

Q Almost all use the side door?

A Yes.

Q Now, do you have an opinion based upon your experience, Mr. Malm, as to the reliability of the delivery of civic flyers by this hand-deposit method in mailbox as opposed to any alternatives means of delivery?

MS. DALY: Objection, your Honor.

THE COURT: Oh, I will permit him to answer that.

A Yes, I do.

Q And what is your opinion, Mr. Malm?

A In my opinion, the most effective way of delivering them is through the mailbox.

* * * * *

[611] Q And what is that opinion?

A In my opinion, they expect to receive them in their mailbox.

Q And, Mr. Malm, I show you what is Government's Exhibit D-1, which is a survey of the comparative effectiveness of different distribution methods in Morris Township and Hanover Township.

Mr. Malm, did you have occasion, prior to today, to read that report as a result of my sending you a copy of it?

A Yes, I have.

Q And based upon your civic experience, do you have an opinion as to the relative reliability of success of delivery of civic flyers by mailbox deposit as opposed to alternative means of deposit? Do you have an opinion as to whether that reliability is greater or less for mailboxes than that indicated in the report?

THE COURT: He hasn't tried it any other way, other than handing it to the householder at the front door. So his opinion would have to be based on speculation.

MR. HAMMER: Well, it's based upon his experience.

* * * * *

E. PAYSON CLARK, JR.

DIRECT EXAMINATION

* * * * *

[618] Q And what is your opinion?

A My opinion is that between two-thirds and three-quarters of the active civic associations in the Town of Greenburgh have a total membership constituent homeowner area of less than 200 family units.

Q Now, Mr. Clark, does the County of Greenburgh Civic Association, or did it during the years that you have been involved, have any coordination or relationship with any activities in the incorporated villages of the town?

A Yes, significantly. And I was deposed on some examples thereof.

Q And with respect to other civic associations and villages or municipalities?

A Yes.

The Tarryhill Homeowners Association in Tarrytown the Hastings Non-Partisan Citizens' Association in Hastings, groups known as ACT in the City of Yonkers, groups in the Hillcrest Park-Ardsley Civic Association in the incorporated Village of Ardsley, civic groups within the incorporated Village of Elmsford.

I can cite others, but it would merely—

GOVERNMENTS
EXHIBIT D

U S. DIST. COURT
S. D. OF N. Y.

* * * * *

III. *Results of Survey*

The basic results of the survey can be seen in Table 2. These are the actual numbers of cases in each of the categories.

Table 2

Numbers of Phone Calls
Broken Down by Method of Delivery and by Response Given

Method Used	Response Given				
	Read	Not Read	Not Found	No Answer	Total *
1. Under Door or mat	57	12	28	25	97(122)
2. On door-knob	65	15	26	17	106(123)
3. In mailbox	108	18	26	23	152(175)
Totals	230	45	80	65	355(420)

* The figures in parentheses under Total include the No Answer column; the figures presented without parentheses are the totals of those households actually contacted.

A summary of the information in Table 2 is shown in terms of the most relevant percentages of responses in Table 3.

Table 3

Percentages of Flyers Read Based on Both Total Delivered and Total Found, Broken-down by Method of Delivery for All Households Successfully Contacted

Method Used	Percentage of Total Distribution Which Were Read	Percentage of Those Found Which Were Read
1. Under Door or mat	59%	83%
2. On door-knob	61%	81%
3. In mailbox	71%	86%
Totals	65%	84%

GOVERNMENT
EXHIBIT AA-1

COUNTY REVERSES URBAN DESIGNATION

Last Thursday, May 18, representatives of the Millstone Planning Board met with the Somerset County Planning Board and representatives of the Hillsborough Planning Board. The meeting was held in response to Millstone's strong opposition to the County's proposed designation of the six square miles south of Millstone as urban.

After much discussion of the needs of the County and municipalities in this area, the Somerset County Planning Board agreed to drop the urban proposal and return the area to its rural designation. The urban designation was not desirable for the needs of either Hillsborough or Millstone.

Thanks once again to those Millstone citizens who attended the Somerset County Planning Board meeting in April to emphasize Millstone's strong objections to the proposal.

OTHER MILLSTONE PLANNING NEWS

I-95

There will be a public meeting by the NJ Department of Transportation to show area residents what studies have developed to date on the proposed I-95. The meeting will be on June 5, Monday, at 8 PM at Hillsborough High School Auditorium. Please attend to express your views.

Van Cleef Development

An extensive Environmental Impact statement is being prepared for the entire tract. It will be available in the Fall, at which time Hillsborough will hold a large public meeting at Hillsborough High School to hear concerns.

MILLSTONE PLANNING BOARD

PLAINTIFFS'
EXHIBIT 2

IMPORTANT!

*May 11, 1974—First chance to register

*May 15, 1974—Last chance to register

**May 22, 1974—Your turn to be counted

THE CHILDREN OF THIS DISTRICT ARE DEPENDING ON *YOU* THIS MONTH—CONTINUATION OF THEIR QUALITY EDUCATION IS VITAL AND ONLY YOU CAN ASSURE THAT IT WILL BE AVAILABLE TO THEM.

YOUR VOTE IN FAVOR OF THE SCHOOL BUDGET IS YOUR PERSONAL COMMITMENT TO THE FUTURE OF *OUR CHILDREN—PLEASE DON'T LET THEM DOWN!*

BUT—You must be registered to vote

*REGISTRATION DATES:

MAY 11—BAILEY SCHOOL
8 a.m.-Noon 3 p.m.-6 p.m.

MAY 15—WEBB SCHOOL
4 p.m.-9 p.m.

**VOTE—VOTE—VOTE:

MAY 22—WOODLANDS H.S.
7 a.m.-9 p.m.

This reminder sponsored by the committee for the election of

BOB ROSEN — He's Made A Commitment
To Our Children

PLAINTIFFS'
EXHIBIT 7

THE RUTLEDGE NEWSLETTER

Rutledge Tenants Association, Glendale, N.Y.

Vol. No. Issue April 1977

On March 1, 1977, twenty members and friends of the Rutledge Tenants Association joined with over seven hundred other delegates from the Queens President's Council in Albany. The main purpose of the trip was to demonstrate to our State government officials just how far we will go to have the Rent Regulating Laws continued. Also, a complete package of pro-tenant legislation was presented to the members of our State Government.

The entire QPC delegation was addressed in Chancellors Hall by Assemblyman A. Hevesi, State Senator E.R. Gold, Queens Borough President D. Manis, and others. Lt. Governor Mary Ann Krupsak gave a rousing keynote speech in support of immediate and continued rent regulation.

From Chancellors Hall, the RTA delegation proceeded to the office of our State Senator, Martin J. Knorr. His secretary advised us that the Senate was in session and the Senator was not immediately available to us. We left our message and headed for the Assembly's quarters.

Our full-time Assemblyman, Al DelliBovi, did meet with our delegation. He informed us that he voted with the majority in the Assembly, where the rent bill was passed 109 to 32. We asked for his continued support if the bill should be returned by the Senate.

The apartment tenant had their own lobbyist in Albany on March 1, 1977. The trip should bear favorable results due to everyone's great support. Thanks go to all those who participated in this special cause.

OVERCHARGES: Anyone thinking they are being overcharged on their rent should leave their name and phone number with their Block Captain and an appointment

will be set up to fill out the necessary papers to apply for a refund.

GARAGES: If you have a specific complaint regarding the use or abuse of a garage, put the complaint in writing and give it to your Block Captain for appropriate action.

LAUNDRY & EXTERMINATOR: All complaints should be put in writing and given to your Block Captain; regarding the one existing laundryroom and the non-existing exterminator.

Lorraine Mitnick	89-48 Doran Ave. (N & S)
Tony Maresca	89-35 Rutledge Ave. (N)
Nestor Avella	89-24 Rutledge Ave. (S)
Judy Rotolo	72-16 Woodhaven Blvd. (N)
Nancy Licata	73-12 Woodhaven Blvd. (S)

PLAINTIFFS'
EXHIBIT 9

COMMUNITY IMPROVEMENT CHECKLIST
[Photo Omitted in Printing]

Nature of Problem	Exact Location (Give Address Where Possible)
1. Clogged Catch Basin	.....
2. Pothole	.....
3. Burned-Out Streetlight	.....
4. Tree Needs Pruning	.....
5. Dead Tree Needs To Be Removed	.....
6. Damaged Curbing	.....
7 Dirty Streets (Indicate Residential or Commercial)	.....
8. Uncollected Refuse or Dumpers	.....
9. Street Sign Needs Replacement (Indicate Type of Sign)	.....
10. Abandoned Car (Give Description and Plate Number, if Possible)	.....

Name .....

Address .....

Telephone Number .....

Please Send To:

Assemblyman Al Delli Bovi
Central District Office
119-06 101st Avenue
Richmond Hill, New York 11419

(over)

PLAINTIFFS'
EXHIBIT 18

MONDAY—ACTION MEETING!

WEST SIDE ACTION GROUP

Monday, October 2, 7:30 P.M.,

Richmond Park Republican Club, 192 Richmond Hill
Information: Charles Jackson, 348-3965

David Cleveland of WESTFAIR TRANSPORT on Victory Street is continuing to make life *miserable* for the neighborhood, in spite of court threats and our appeals to police.

The INDUSTRIAL PARK proposed for West Avenue will bring *thousands* more cars and trucks through this area every day, and we have enough traffic already!

COME TO THIS MEETING—

HELP FORCE THESE AND ANY OTHER ISSUES THAT CONCERN *YOU!*

PLAINTIFFS'
EXHIBIT 14

STOP MR. ZIP!

From destroying valuable *wetlands!*

From decreasing *property values!*

From taking over 13 industrial acres off the *tax roles!*

From adding more *pollution* to Stamford's already dirty air!

From bringing out-of-state builders into our competitive *job market!*

From creating a daily 2,000 car *traffic jam!*

From *endangering seniors and children alike* by bringing more out-of-town workers to our *conjested city!*

From defying Carter's Urban Policy by putting a central city type of project in Stamford's largest *black residential neighborhood!*

[Photo Omitted in Printing.]

PUBLIC HEARING

To Limit Standard Brands Development

Environmental Protection Board
Cloonan Middle School, corner of North and Adams
THURSDAY March 15, 8 P.M.

For rides or information call Gloria Helenese, 323-3946

PLAINTIFFS'
EXHIBIT 16

BETTER NEIGHBORHOOD ASSOCIATION
PUBLIC HEARING

Cloonan School, Tuesday, August 29, 1978, 8:00 p.m.
TO SAVE OUR NEIGHBORHOOD

from traffic, noise, pollution, flooding, danger!

If you *can't* come because:

you have to feed the kids, you don't have a car, you work nights, you have to do your hair, you're tired at night, you have to mow the lawn, or there's a good movie on TV,

then:

leave the kids some sandwiches, get a ride from a friend, tell your boss something *important* has come up, come in curlers, have a cup of coffee, let the yard go natural for a week, and read the book sometime instead.

If you *won't* come because:

you don't want to get involved and we can't win anyway so why try,

then:

think again! You are *already* involved because it's *your neighborhood* they want to *destroy*, and the only way we'll ever know if we can win is to *try*—but if we *don't* try we *won't* win!

Stamford has walked on our area long enough—*Stand and fight* at Cloonan School Tuesday night!

FOR RIDES & INFO
CALL JOHN FERSNER

348-7698

PLAINTIFFS'
EXHIBIT 18

OAK PARK TENANTS

116 Ursula Place
Stamford, Ct. 06902

EMERGENCY MEETING

ABOUT OUR 4% SECURITY INTEREST

Two weeks ago forty-five OAK PARK TENANTS were *stood up* at a meeting set for Tenants and Housing Commissioners—*HOWEVER*—Margot Wormser, Housing Director, *agreed to arrange a meeting* between Commissioners and Tenants *here* in the Oak Park Laundryroom.

NOW Wormser is trying to *back out* of that commitment —*BUT WE WON'T LET HER!*

IMPORTANT MEETING—Laundryroom, 7:30 pm, Thursday, June 29—*TENANTS ONLY!* ....

PLAINTIFFS'
EXHIBIT 20

[Photo Omitted in Printing]

COUNCIL OF GREENBURGH
CIVIC ASSOCIATIONS
GREENBURGH TAXPAYERS

The following proposition will appear on the ballot at a SPECIAL ELECTION on June 5, 1979 at all LOCAL GREENBURGH POLLING PLACES between the hours of noon and 9:00 p.m.

Shall the Greenburgh Government Reorganization Law providing for more efficient operation through: Four year terms for Supervisor and Town Clerk, Supervisor serving full time without other business or occupation, Supervisor appointing, with Town Council consent, all department heads and officers, Deputy Supervisor appointed from elected officials, Supervisor administrative head with vote on Town Board, Town Council to serve only legislative function except where required by law, Specifying circumstances under which Deputy Supervisor shall act as Supervisor and setting the compensation therefore, Requiring special or regular election within six months after vacancy occurs in office of Supervisor BE APPROVED!

NO

Placing this revision of our Local Town Law as a single proposition on the ballot restricts you to one vote (YES OR NO), for more than FIVE separate issues. In addition, a SPECIAL ELECTION for this proposition is costing taxpayers $12,000 that could be saved if this vote was held during the regular November election! IF THIS LAW IS APPROVED, it will:

1—*INCREASE* the SUPERVISOR'S TERM OF OFFICE TO FOUR YEARS! We feel that the present 2 year term is adequate—(Congressmen and state legislators serve only 2 years).

2—*REMOVE* from the COUNCILPERSONS the privilege of nominating persons for appointments—reserving this right for the SUPERVISOR ONLY,—Supervisor has sole power to remove persons from appointed positions.

3—*PERMIT* the SUPERVISOR TO APPOINT A TOWN COUNCILPERSON as his Deputy Supervisor to replace him in time of vacancy or emergency. Sets succession guidelines for emergency replacement of Supervisor.

4—*REMOVE* from the COUNCILPERSONS the requirement that they approve all on-going departmental expenditures. Limits their fiscal involvement to approval of the annual budget and bid acceptance. SUPERVISOR and Comptroller are responsible for all other expenditures. (This makes the Council less aware of where the money goes).

5—*INCREASE* the TERM OF OFFICE FOR THE TOWN CLERK TO FOUR YEARS.

THE BOARD OF GOVERNORS OF THE COUNCIL OF GREENBURGH URGES YOU TO VOTE NO!

THIS CHANGE IN OUR TOWN LAW WILL AFFECT THE ADMINISTRATION OF THIS TOWN FOR YEARS TO COME. MAKE IT YOUR BUSINESS TO LEARN THE FACTS. ASK QUESTIONS!

THESE CHANGES AFFECT YOU AS A RESIDENT AND TAXPAYER

VOTE VOTE VOTE VOTE VOTE VOTE VOTE

Mr. Odd-Magnus Mortensen, Chairman—

36 Abbeville Lane, White Plains, NY (Greenburgh)

PLAINTIFFS'
EXHIBIT 22

SAW MILL VALLEY CIVIC ASSOCIATION

The Second Quarterly Meeting of the
Membership of the Association—1976

ELECTION NIGHT

Date: June 7, 1976—Time: 8:00 PM

Place: St. Joseph of Arimathea

AGENDA

1. Communications: Among these are:

   (a) The Association now has the status of a non-profit association. We have been requested to make one important point clear: The dues which establish you as a voting member ($4.00) each year they are paid—or any other contribution—are not tax deductable.

   (b) The Saw Mill Valley Environmental Steering Committee has been established to facilitate the creation of a District for Flood Control, Conservation and Recreation under the jurisdiction of the County of Westchester. Besides working to find alternatives for flood control a major aim of the committee is to create a lineark park through the length of the river valley in Westchester, using the Putnam Railroad (now in the reluctant hands of Conrail) as a bike trail.

   This committee came into being through the support of the Executive Committee of this Association. This venture, which we firmly intend to see accomplished, should have a significant impact upon the quality of life (and land values) in this Valley. The committee consists of: Robert Barron, Esq., Secre-

tary; John Buckley, Esq., Pleasantville Home Owners; Carol Coggeshall, Audubon Society; Jon Hammer, Esq., Environmentalists, Bar Association, Westchester; Drew Panko, Council Greenburgh Civic Associations; Fridtjof Schroder, Chairman; Advisory: Leo Alperson, Businessman; Ted Buckley, Boyce Thompson Institute; Laurence Rockefeller, Esq., Natural Resources Defense Council; Ex Officio: Westchester Commissioner, Peter Eschweiler, Frank Bohlander, Joseph Caverly.

Late in June, elected and appointed officials of the various affected municipalities will be invited to be representatives on the committee.

2. Announcement: *Mr. Paul Rosenzweig* elected vice-chairman of the Council of Greenburgh Civic Associations; *Mr. Michael Pizzolla* elected a Governor of the Council of Greenburgh Civic Associations.

3. Election of Officers and Executive Committee Members for 1976-77.
Only dues paying members of the Association are eligible to hold office. Mr. Harry Bender has sought out candidates for these positions. Those who have spoken in the affirmative *and are members in good standing* are listed on the reverse side of this agenda. An amendment to the constitution has been declared necessary, amending an amendment voted at the 2nd Quarterly Meeting of 1974 (Article IX, Executive Committee) to permit membership on the committee by those who are pressed for time and cannot attend as often as they might wish.

   Positions to be filled: Chairman, Vice Chairman, Treasurer, Secretary, Membership Chairman.
   Those who have indicated they will accept a position are:

Vincent Aglieco*
Louis Barone*
Harry Bender*
Harriet Cadoff
Donald Cutler*
Raymond Frascene*
Hyman Goldflies*
Jeanette Goldflies*
Barry Littman
Marilyn Littman*
John MacGuffie*
Michael Pizzolla
Alfred Revzin
Norma Revzin*
Claire Rosenzweig*
Paul Rosenzweig*
John Scheib*
Caroline Schroder*
Fridtjof Schroder
Dolores Sonne*
Amy Sullo*
John Thorne*
Barry Kreisberg*

3. Continuing discussion of East Rumbrook Park. The Executive Committee has expressed concern over the 8 ft wide road-bike trail through the length of the park.

4. West Rumbrook Park archery organized by a private group in cooperation with the Greenburgh Recreation Commission.

   Mr. Parick Cristello, Chairman of the Archery Club will come accompanied by members of the Club explain the nature of their sport, bringing with them examples of their equipment. Possibly some of the members of this Association and/or their children might wish to obtain lessons and possibly, in time, join the club.

5. The Greenburgh Police Department will send some of its officers to this meeting to discuss their role in law enforcement, youth programs, and home security. Considering our keen concern about matters such as this all the members that can make it to this meeting should come so as to be better informed. Come prepared to ask pertinent questions that are of vital concern. Police Chief Singer informs me they wish to present as positive a view as possible. THIS IS YOUR OPPORTUNITY.

*** These have indicated interest in only being on the executive committee. However, sometimes minds change.**

PLAINTIFFS'
EXHIBIT 35

[Photo Omitted in Printing]

HARTSDALE FIRE DISTRICT

—NEWS—

"IN CASE OF FIRE"

CALL 949-2324

75th ANNIVERSARY CELEBRATION

ON SUNDAY, MAY 20, AT 2:30 P.M. THE HARTSDALE FIRE DEPARTMENT PROUDLY CELEBRATES ITS 74th ANNIVERSARY WITH A PARADE. WE WILL BE JOINED BY SOME 20 LOCAL FIRE DEPARTMENTS WITH ACCOMPANING BANDS AND APPARATUS. AMONG THOSE IN THE LINE OF MARCH WILL BE GREENBURGH TOWN SUPERVISOR A. VETERAN AND OUR LOCAL SCOUTING AND CIVIC ORGANIZATIONS.

THE NATIONALLY ACCLAIMED "SKYLINERS" DRUM AND BUGLE CORPS. WILL BE A HIGHLIGHT OF THE EVENT IN BOTH THE PARADE AND IN EXHIBITION AT THE WEBB SCHOOL FIELD, IMMEDIATELY FOLLOWING.

THE PARADE WILL START AT THE RAILROAD STATION, PROCEED ALONG EAST HARTSDALE AVENUE TO CENTRAL AVENUE TO THE WEBB SCHOOL FIELD.

COME OUT ON MAY 20th AND JOIN YOUR NEIGHBORS IN CELEBRATING A SPECIAL DAY WITH YOUR FIRE DEPARTMENT.

C.P.R.

Starting the week of April 30, 1979 your Hartsdale Fire Department will be offering C.P.R. classes every Tuesday and Thursday night between 7 p.m. & 10 p.m. and also on Saturday mornings.

The course will be set up so that you can study at home and come to the firehouse to be checked out. A qualified instructor will be available and we will make every effort to accomodate you.

The cost for books will be $3.00 per person. If you have any questions, please call Deputy Chief Marsala at 949-2325.

HOW WE MAINTAIN A "CLASS A" FIRE DEPARTMENT AT REASONABLE COST

As a resident of the Hartsdale Fire District you have probably heard or seen the Hartsdale Fire Department referred to as a "Class A" organization. And although you can be justifiably proud of the fact that your department is so designated, you may have wondered what it all means in terms as such things as insurance, taxes and indeed, your life.

First, a little background. The "Class A" designation is assigned by a group known as The Insurance Services Office, an organization retained by the nation's major insurance companies to help determine the efficiency of a fire department and the characteristics of the area it serves in order for those companies to have some yardstick in determining the premiums to be charged when insuring local properties. The determination by ISO comes after a team of experts conduct an exhaustive study of the department which includes field tests on pumping ability and condition of fire apparatus, type of apparatus and auxiliary equipment available, efficiency and training of paid and volunteer Firefighters, location of fire stations, etc.

The Hartsdale Fire Department is one of the very few in the area to enjoy a "Class A" designation but we are quick to point out that although hundreds of departments have lower ratings, they are considered completely competent. Lack of a proper size water main in a given area, can mean the difference between an "A" and "B".

As for the relationship of a "Class A" designation to insurance premiums it naturally means lower cost insurance however, the direct effect is felt only at the commercial property level ie. stores, shopping centers, office buildings and the like. And here, additional forces come into play such as sprinkler systems, fire walls, hydrant location—all combine to determine a specific premium. As for the private homeowner the benefit of maintaining a "Class A" fire department may not be readily apparent in terms of reduced insurance premiums but the designation goes a long way toward holding insurance costs to reasonable levels and keeps the community out of a "High Risk" designation which may be assigned to an area with a deficient fire department.

PLAINTIFFS'
EXHIBIT 41

GLIMPSES

MAYFAIR-KNOLLWOOD CIVIC ASSOCIATION

December 1, 1978

DON'T BE APATHETIC TO THIS!

31% tax boost

The first public hearing concerning the proposed 1979 budget for the Town of Greenburgh was held Monday, November 27. Despite a large attendance by irate and vocal citizens (many from our area), our Superviser, Mr. Veteran, appeared unmoved. Your next, and LAST, chance to be heard by the members of the Town Board will be Thursday, December 7, at 8 p.m., at the Town Hall. Residents may obtain copies of the budget at the Town Hall. Wednesday, December 13, is the date for adoption of the budget, either as it is now, or as it is amended.

THE VALHALLA BOARD OF EDUCATION, in order to enable more people to participate in the budget process, will be holding a series of workshops to review the different areas in the prospective budget. These meetings are to be held in the high school cafeteria, at 8 p.m., on the following evenings:

December 12:	Athletics, co-curricular activities, buildings, grounds and equipment
January 9:	Textbooks and major budget areas
January 16:	Instructional supplies and workbooks

These meetings are open to all district residents.

ELECTION FOR FIRE COMMISSIONER

All residents are eligible to vote for Commissioner of the Fairview Fire Department. This election, which requires no pre-registration, will be held Tuesday, December 12, from 6-9 p.m. at the Fire Headquarters on Rosemont Blvd. Irwin S. Schultz, the incumbent, is being challenged by Eugene Malone.

WINTER

Greenburgh Police Chief Donald Singer sent us a reminder that it is illegal to park vehicles on town roads in the unincorporated area of the Town of Greenburgh, between the hours of 1 a.m. and 6 a.m. from December 1 to March 15. The purpose of this is to facilitate snow removal.

The fire department would appreciate it if residents would see that the areas around the fire hydrants were cleared of snow after major snow storms.

THE GREENBURGH COMMITTEE FOR REVISION OF TOWN GOVERNMENT has formulated a series of proposals for reorganizing elected offices in the town and will hold a public informational meeting at the Town Hall on Thursday, December 14, at 8 p.m. in the Town Hall.

LITTER is once again becoming a problem in the area of the deli and on the lawns of those who live in the block or two leading away from the deli. Not all the blame for this can be placed on the shoulders of those who come from outside our neighborhood. Please remind your children that, out of respect for their neighbors and their neighborhood, they should either place their trash in the receptacles provided at the deli or pocket it when they are walking along the streets.

This will be the last *Glimpse* for 1978 and we wish to take the opportunity to wish everyone a happy holiday season and a good New Year.

TOWN OF GREENBURGH
DEPARTMENT OF PUBLIC WORKS
P.O. Box 205, Elmsford, N. Y. 10523

Dear Neighbor:

Due to the high accident and Workmen's Compensation case increase and the inability to maintain a satisfactory sanitation collection schedule during inclement weather, the Town Board has amended the Sanitation Code of the Town of Greenburgh to eliminate the "back yard" pickup during periods of severe inclement weather. This amendment was passed on May 24, 1978, and reads as follows:

Section 43-5(D): In the event of severe weather conditions, the Commissioner shall have the authority to declare a sanitation snow emergency. Subsequent to such declaration, the Town of Greenburgh will make collections of garbage placed at curbside only until such time as the Commissioner, in his discretion, shall announce the lifting of the sanitation snow emergency.

The duration of these emergency periods will be determined by the Commissioner and will encompass several factors. Basically, until such time as driveways and walk paths giving access to the normal location that enjoys the usual back yard pickup are cleared, this emergency will be in force.

When this emergency is invoked it will be announced over Radio Station WFAS (1230 AM), but in the absence of that announcement, I am sure your own observations should be a clear indication that your garbage containers should be set at the curb prior to 7:00 a.m. on your routine days of collection.

PLAINTIFFS'
EXHIBIT 43

UNITED STATES POST OFFICE
White Plains, New York 10602

March 15, 1977

Highlands Civic Association
64 Prospect Street
White Plains, N. Y. 10606

Dear Sir:

It has been brought to my attention that you deposited in mail boxes in the Gedney area of White Plains, N. Y., without postage affixed, the attached piece of mail.

This practice is illegal and postage can be charged for each item distributed in that manner. The enclosed copy of Postal Regulations pertaining to this subject are self-explanatory. You must conform to these regulations or face a fine up to $300.00.

Very truly yours,

/s/ Walter W. Rostenberg
WALTER W. ROSTENBERG
Postmaster

PLAINTIFFS'
EXHIBIT 46

UNITED STATES POSTAL SERVICE
POSTAL INSPECTOR

New Brunswick, New Jersey 08901

Inspector
B. F. Conklin

Case No. _____

December 20, 1978

Millstone Borough Council
c/o The Honorable Mary Patrick
Mayor of Millstone
11 Alley Street
Somerville, NJ 08876

Dear Mayor Patrick:

Reference is made to letters of May 8, June 7 and June 8, 1978 sent by the Somerville, NJ Post Office to your office, copies attached, relative to the deposit of mailable matter in mailboxes without payment of postage.

Please be advised that this is a violation of both Postal regulations and Federal law. Copies of the applicable Postal regulations and sections of the U. S. Code are attached.

It is therefore requested that you forward to this office a check made payable to the U. S. Postal Service in the amount of $49.92 to cover the deposit of 384 pieces of mailable matter in mailboxes without payment of postage. If you have any questions concerning this matter, feel

free to contact me at P.O. Box 160, New Brunswick, NJ 08903, telephone number 201-846-5067.

Respectfully,

/s/ B. F. Conklin
B. F. CONKLIN
Postal Inspector

jz

PLAINTIFFS'
EXHIBIT 48

SUMMARY-EXTRACT FROM POSTAL RECORDS SUBMITTED IN RESPONSE TO PLAINTIFF'S WRITTEN INTERROGATORIES REGARDING INVESTIGATIONS OF ALLEGED VIOLATIONS OF 18 U.S.C. SECTION 1725 FOR THE PERIOD JANUARY 1, 1977 THROUGH MARCH 2, 1979

I. *REGIONS COVERED*

Los Angeles
Newark
Washington D.C.
Detroit
Fort Worth
Boston
Pittsburgh
Chicago

II. *BREAKDOWN OF COMPLAINTS PER REGION*

	Total	Commercial	Individual, Personal Unknown—P.O. Carrier	Non-Profit	Number Postage Uncollected
Los Angeles	12	11	1	0	10
Newark	45	39	6	0	24
Wash. D.C.	34	24	4	6 (Incl. 1 Govt. D.C.)	
Detroit	45	35	5	5	
Ft. Worth	15	12	1	2	
Chicago	44	37		7	
Pittsburgh	11	10		1 (Charity V.O.A.)	7
Boston	20	15	5		
	226	183	23	21	41

A.—Non-profit in postal analysis includes political candidates and political parties.

THERE IS NO RECORD IN ANY OF THE ABOVE OF ANY COMPLAINTS AGAINST OR INVESTIGATIONS WITH RESPECT TO CIVIC ORGANIZATIONS.

III. Percentage (%) of commercial distributions to total distributions with respect to 18 U.S.C. section 1725 alleged violations.—81%

IV. Collection of postage on alleged violations.

	Total	Number Uncollected
Los Angeles	12	10
Pittsburgh	11	7
Newark	45	24
	68	41

Percentage of 18 U.S.C. section 1725 violations as to which there has been no collection—60%

SUPREME COURT OF THE UNITED STATES

No. 80-608

UNITED STATES POSTAL SERVICE,
Appellant,

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATION, ET AL.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

January 12, 1981

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No. 80-608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED

Whether 18 U.S.C. 1725, which prohibits the deposit of unstamped "mailable matter" in letter boxes used by the Postal Service for the delivery of mail, unconstitutionally abridges the First Amendment right of appellee civic associations to freedom of expression.

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In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the district court on remand (J.S. App. 1a-12a) is reported at 490 F. Supp. 157. The opinion of the court of appeals remanding the case to the district court (J.S. App. 13a-19a) is reported at 586 F.2d 935. The original opinion of the district court (J.S. App. 23a-31a) is reported at 448 F. Supp. 159.

JURISDICTION

The judgment of the district court (J.S. App. 20a-21a) was entered on May 20, 1980. A notice of ap-

peal to this Court (J.S. App. 22a) was filed on June 18, 1980. On August 6, 1980, Mr. Justice Marshall extended the time for docketing the appeal to and including October 16, 1980. The appeal was docketed on October 14, 1980.[1] This Court noted probable jurisdiction on January 12, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1252. *United States* v. *Darusmont*, No. 80-243 (Jan. 12, 1981), slip op. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

18 U.S.C. 1725 provides:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

STATEMENT

1. This case involves the question whether 18 U.S.C. 1725, which prohibits the placement of "mailable matter" in a letter box without the payment of

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[1] Under Rule 12.4 of the Rules of this Court, appellees docketed a cross-appeal on November 18, 1980 (No. 80-815). The Court has not acted on the cross-appeal.

postage, may constitutionally be applied to appellee civic organizations.[2] The statute was enacted in 1934 "to curb the practice of depositing statements of

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[2] Under 39 U.S.C. 401, the United States Postal Service is broadly empowered to adopt rules and regulations designed to accomplish the objectives of the Postal Reorganization Act of 1970. Many of the Postal Service's current regulations are contained in the Domestic Mail Manual (DMM), which has been incorporated by reference into the Code of Federal Regulations. 39 C.F.R. Part 111. The DMM requires both urban and rural customers to provide appropriate mail receptacles. DMM 155.41, 156.311, 156.54. Although the DMM contains detailed specifications for the permissible size, shape, and dimensions of letter boxes and mail slots (see DMM 155.43, 156.51), the Manual provides generally that "[e]very letter-box or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 U.S.C. * * * 1725." DMM 151.1. Accordingly, in the Postal Service's view, if a particular receptacle is actually used for the receipt or delivery of mail, it is a "letter box established, approved, or accepted by the Postal Service" within the meaning of Section 1725, even if it does not comply with one or more provisions in the DMM governing the characteristics of letter boxes. (The prohibition contained in 18 U.S.C. 1725 is repeated in the Postal Service's regulations at DMM 146.21.) The DMM explicitly states that the post on which a mail receptacle rests "is not part of the receptacle" and therefore is not considered part of the "letter box" for purposes of Section 1725. DMM 151.1. Since September 1980, the DMM has specified that "door slots, and nonlockable bins or troughs used in connection with apartment house mailboxes are not letter boxes within the meaning of 18 U.S.C. 1725 * * *." 45 Fed. Reg. 56057 (1980). This regulation appears to be consistent with the Postal Service's past practice in connection with the enforcement of Section 1725. In any event, neither door slots nor apartment house mailboxes are involved in this case.

account, circulars, sale bills, etc., in letter boxes established and approved by the Postmaster General for the receipt or delivery of mail matter without payment of postage thereon, by making this a criminal offense." H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934).[3]

2. Appellee Council of Greenburgh Civic Associations is an umbrella organization for a number of civic groups in Westchester County, New York.[4] Appellee Saw Mill Valley Civic Association is one of the Council's member groups. In June 1976, the Postmaster in White Plains, New York, notified the Chairman of the Saw Mill Valley Civic Association that the practice of delivering messages to local residents by placing unstamped notices and pamphlets in the letter boxes of private homes is illegal and that postage can be charged for each item distributed in

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[3] The Senate and House Committees on Post Offices and Post Roads explained the principal motivation for the statute in the following terms:

> Business concerns, particularly utility companies, have within the last few years adopted the practice of having their circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails, and at the same time is resulting in the stuffing of letter boxes with extraneous matter.

H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934).

[4] The Town of Greenburgh is the political subdivision of Westchester County in which the appellee civic groups are located.

that manner (A. 24). Several members of appellee Council, including the Saw Mill Valley Civic Association and the Hilltop Farms Civic Association, apparently had violated 18 U.S.C. 1725 by depositing materials concerning civic association affairs in local letter boxes without paying the required postage. In response to an inquiry from appellees' counsel, the Postal Service confirmed that the practice of the civic associations was unlawful and, if continued, could result in a fine not exceeding $300 (A. 25-28).

Several months later, in February 1977, appellees filed this suit in the United States District Court for the Southern District of New York. They contended that enforcement of 18 U.S.C. 1725 would inhibit their communication with residents of the Town of Greenburgh and would thereby deny them the freedom of speech and freedom of the press guaranteed by the First Amendment (A. 3-17).

The district court dismissed the complaint for failure to state a claim on which relief could be granted (J.S. App. 23a-31a).[5] Relying on *Grayned*

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[5] The district court rejected appellees' contention that 18 U.S.C. 1725 does not apply to noncommercial matter (J.S. App. 25a-28a). In the court's view, two pieces of evidence in the statute's legislative history demonstrate that Congress intended the law to cover civic notices and political pamphlets as well as advertisements, statements of account, and other commercial items. The court first pointed (J.S. App. 26a-27a) to a colloquy on the floor of the House of Representatives in 1932, during debate on H.R. 9262, the nearly identical predecessor of the bill enacted two years later. Representative Mead, the Chairman of the House Post Office Committee, rejected a proposed floor amendment that would have added the word "commercial" to the bill in order to permit the deposit of community notices in letter boxes without payment of postage. The district court also cited a 1934 press release

v. *City of Rockford*, 408 U.S. 104, 116-117 (1972), the court ruled that Section 1725 "imposes only a minimal burden on [appellees'] activities" and that the statute is narrowly tailored to further legitimate and significant governmental interests (J.S. App. 30a). The court observed that appellees "are free to leave community messages on doorknobs, behind screen doors, and in similar locations" (*ibid.*). In the court's view, "[t]he existence of this alternative seriously undermines [appellees'] claim that enforcement of the statute effectively prohibits their activity by imposing postage costs that volunteer community organizations cannot afford" (*ibid.*). In any event, the court concluded (*ibid.*),

> the Constitution does not guarantee plaintiffs an absolute right to the most efficient or effective means of communication.

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in which the Postmaster General announced an amendment in postal regulations that prefigured the statute enacted a few months later. In that press release, the Postmaster General observed (App., *infra*, 2a) (emphasis added):

> Patrons of the Postal Service throughout the country have deluged the Department with complaints that their private letter boxes have been cluttered with all kinds of advertising matter, circulars, statements, bills, *political handouts*, tickets of all kinds, bargain sale announcements, etc.
>
> In many instances letter carriers have found it difficult to deposit mail in the overcrowded letter boxes, and in the larger cities this has worked considerable hardship on the carrier with a resultant lost of time.

The district court concluded (J.S. App. 28a): "These contemporaneous records indicate that, although non-commercial matter was not the primary focus of Post Office Department or Congressional concern at the time the statute was enacted, it was intended to be within the scope of the statutory prohibition."

The court of appeals reversed, holding that the case should not have been dismissed before trial because "enough is alleged in the complaint to raise the issue of infringement of freedom of communication" (J.S. App. 14a). The court of appeals remanded the case to the district court to give the parties "an opportunity to submit proof as to the extent of the handicap to communication caused by enforcement of the statute in the area involved, on the one hand, and the need for the restriction for protection of the mails, on the other" (*ibid.*; footnotes omitted).

On remand, the Postal Service demonstrated that Section 1725 protects mail revenues, facilitates efficient and secure delivery of the mails, and promotes the privacy of mail patrons. Although Congress' primary purpose in enacting Section 1725 was the protection of mail revenues, the statute also plays a role in the investigation of mail theft. By restricting legitimate access to letter boxes, the statute allows investigators and other observers to assume that anyone other than the postal carrier or the householder who opens a mailbox may be engaged in a violation of the law (A. 66-70).[6]

The Postal Service also introduced evidence describing the additional burden on postal resources that would be imposed by an injunction against the enforcement of Section 1725 as applied to civic or political organizations. If the statute may be applied to commercial materials alone, mail carriers will be obliged to remove and examine individual unstamped items found in letter boxes to determine if their deposit there is lawful (A. 143-145). Carriers

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[6] In particular, Section 1725 has proven helpful in the investigation of thefts of government benefit checks from letter boxes in economically depressed areas (A. 159-161).

will also be confronted with a larger total amount of unstamped mailable matter in letter boxes, which they will be obliged to separate from outgoing mail placed in the boxes by postal patrons for collection. A cost analysis showed that, if this extra duty is required on a nationwide basis, it will add substantially to the expenses incurred in daily delivery of the mail (*ibid.*).

The Postal Service's evidence further showed that appellees have ample alternative methods of delivering their messages, such as by placing notices or pamphlets under a door or doormat or on a doorknob. A survey of the comparative effectiveness of different distribution methods produced the following results (A. 165):

Method Used	% of Distribution Found That Were Read	% of Total Distribution Read
Under Door or Mat	83%	59%
On Door Knob	81%	61%
In Mail Box	86%	71%

Appellees submitted evidence to show that the payment of postage would be financially burdensome to them because of their minimal resources (A. 36-37, 55-56, 100-101, 115). Appellees' witnesses also testified that mail delivery service sometimes is too slow to satisfy the civic associations' need to communicate quickly with their constituents (A. 36-37, 84-86, 95-97).

The district court balanced the benefits derived by the Postal Service from Section 1725 against the harm suffered by appellees as the result of the statute and concluded that "the cost to free expression of imposing this burden on [appellees] outweighs the showing made by the Postal Service of its need to enforce the statute to promote effective delivery and

protection of the mails" (J.S. App. 9a).[7] The court therefore enjoined the Postal Service from enforcing Section 1725 against appellees or the Council's constituent civic associations (J.S. App. 20a-21a).

SUMMARY OF ARGUMENT

18 U.S.C. 1725 is a reasonable, content-neutral statute enacted to protect mail revenues and to promote efficiency and security in the delivery of the mails. The prohibition against placement of unstamped mailable matter in letter boxes has no more than a negligible effect on the exercise of First Amendment rights, and any such effect is a permissible byproduct of a narrowly drawn restriction on the place and manner in which communication may occur. The statute therefore does not violate appellees' constitutionally protected freedom of expression.

Section 1725, which was passed in 1934, is a presumptively valid Act of Congress, plainly authorized by the powers delegated in Article I, Section 8 of the Constitution to "establish Post Offices and post Roads" and to make all laws "necessary and proper" for that purpose. The statute bans the deposit of *all* unstamped mailable matter in letter boxes and thus does not depend on the content of the materials that a person may wish to distribute without paying postage. Section 1725 therefore does not implicate the

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[7] The district court refused to consider the statute's benefits to the privacy interests of mail patrons on the grounds that the Postal Service could not raise such interests and that, in any event, homeowners could protect those interests by posting "no trespassing" signs or enforcing local trespass laws (J.S. App. 11a n.8).

central concern of the First Amendment, which is the restriction of expression because of the message it conveys.

To the extent that Section 1725 regulates speech at all, it limits only the place and manner of expression. But this Court has repeatedly upheld such restrictions if they "serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Commission*, No. 79-134 (June 20, 1980), slip op. 4-5. Here, Section 1725 leaves open a number of effective alternative methods by which appellees may circulate notices and handbills to their constituents. Appellees may use the mails, upon payment of the required postage; they may distribute their announcements to private homes by leaving notices under the door or on the doorknob or by tacking them to a post; and they may communicate through person-to-person distributions or by telephone. If appellees have special concerns that make them reluctant to use these alternative channels or if their peculiar needs make alternative methods of communication marginally less effective, that is not sufficient to render Section 1725 invalid under the First Amendment.

A variety of significant governmental interests are served by Section 1725. The statute prevents the dilution of mail revenues and protects the security of the mails. The statute also promotes the efficient delivery of the mails by avoiding overcrowding and eliminating the need for postal carriers to perform extensive sorting of mailable matter found in letter boxes. In addition, Section 1725 helps ensure the privacy of postal patrons by limiting legitimate access to the contents of mail receptacles.

Letter boxes are part of the postal system, and they would not exist were it not for the Postal Service. The modest fee of ordinary postage to defray the expenses of the postal system is not an unreasonable price to pay for the privilege of using part of that system. Section 1725 does not violate the First Amendment by requiring appellees either to pay this postage or to deliver their messages without using letter boxes.

ARGUMENT

18 U.S.C. 1725 DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT IS A REASONABLE, CONTENT-NEUTRAL REGULATION OF POSTAL AFFAIRS THAT IMPOSES ONLY A MINIMAL RESTRICTION ON THE PLACE AND MANNER OF COMMUNICATION

The Constitution empowers Congress to "establish Post Offices and post Roads" and to "make all Laws which shall be necessary and proper" for executing that task. Congress has exercised these powers to establish a postal system governed by detailed statutes and regulations. See 39 U.S.C. 401 *et seq.* and the Domestic Mail Manual. Neither the district court nor appellees have suggested that 18 U.S.C. 1725 exceeds Congress' power under the Post Office and Necessary and Proper Clauses in Article I, Section 8. Letter boxes are an essential part of the mail delivery system and are therefore subject to reasonable regulations. We begin, then, with a presumptively valid federal statute, unchallenged for more than 40 years, and clearly within the powers delegated to the Legislative Branch by the Constitution.

The next important characteristic of Section 1725 is that it does not in any way restrict appellees' right

or opportunity to use the mails. Appellees may mail their civic notices in the ordinary way, and the Postal Service will treat them identically with all other mail. To be sure, if appellees choose to use the mails, they will be required to pay postage, but appellees do not purport to challenge the constitutionality of the imposition of a fee for the services provided by the postal system. Because of the nature of the Postal Service's business, virtually all aspects of its operations have some incidental impact on the ability of people to communicate effectively. Yet appellees do not and could not seriously contend that every postal regulation that imposes some requirement on persons wishing to use the mails is, for that reason, invalid. As this Court has written, "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966).

The First Amendment does not obligate the Postal Service to make the mail system available to any user on the most convenient possible terms. More generally, the Amendment does not impose on the government any affirmative obligation to fund or otherwise facilitate constitutionally protected expressive activity. Indeed, this Court has frequently sustained governmental regulations that arguably impose some restriction on the ease with which communication can occur. See, *e.g.*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) (rejecting First Amendment challenge to license and fee requirement for parades and processions in the public streets); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130-

131 (1977) (prison regulation prohibiting deliveries of bulk mail to prisoners' union and thus making bulk mailing rates unavailable to parties wishing to communicate with union members "does not fundamentally implicate *free speech* values"); *Kovacs* v. *Cooper*, 336 U.S. 77, 88-89 (1949) (plurality opinion) ("That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open").[8] Cf. *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 18 (no constitutional obligation to provide financial resources needed to exercise protected rights); *Maher* v. *Roe*, 432 U.S. 464, 474-475 n.8 (1977) (same). Although appellees' do not complain in so many words that Section 1725 impermissibly burdens their use of the mails, their real grievance is that the statute requires payment of a fee—*i.e.*, postage—before part of the postal system may be used for the delivery of their messages. But this is precisely the kind of governmental "inhibition" on free communication that the Court has repeatedly upheld under the First Amendment.

The third factor critical to the disposition of this case is the undisputed and indisputable content-neutrality of Section 1725. The statute's prohibition on

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[8] Indeed, in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), this Court upheld a city's complete refusal to permit the sale of space for political advertising on the local public rapid transit system, even though the city allowed advertising in that forum for commercial enterprises, religious organizations, and civic and public-service groups.

the placement of unstamped mailable matter in a letter box applies without regard to the nature of the items involved.[9] In no sense, therefore, does Section 1725 entail government interference with the

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[9] A Postal Service regulation appears to create an exception to this general proposition. DMM 156.58 provides that "publishers of newspapers regularly mailed as second-class mail may, *on Sundays and national holidays only*, place copies of the Sunday or holiday issues in the rural and highway contract route boxes of subscribers, with the understanding that copies will be removed from the boxes before the next day on which mail deliveries are scheduled" (emphasis in original). The language of Section 1725 does not explicitly authorize the Postal Service to make exceptions to the general prohibition against the deposit of unstamped mailable matter in letter boxes. In any event, however, the validity of DMM 156.58 is not at issue here. Appellees' challenge to Section 1725 does not depend on the existence of DMM 156.58, and appellees have not disputed the characterization of Section 1725 as a content-neutral statute. Moreover, the exception created by DMM 156.58 is an extremely narrow one, designed in fact to advance the purpose of Section 1725 by protecting mail revenues. DMM 156.58 applies only to newspapers that are regularly mailed as second-class mail and that therefore contribute to the finances of the postal system; it affects only days on which mail is not delivered and only materials that, by their very nature, could not be ready for distribution at some earlier time; because timeliness is a critical component of newspapers' appeal and utility, it is essential that they be delivered on days when mail service is unavailable, and there will ordinarily be a factual justification for the understanding, required by DMM 156.58, that they will be removed from letter boxes before the next scheduled mail delivery. By granting this limited dispensation to newspapers regularly distributed through the mails, DMM 156.58 encourages publishers to use the mails to distribute their papers. The regulation thus serves to increase mail revenues and thereby furthers the primary purpose of Section 1725.

content of expression, which, as this Court has often emphasized, is the central concern of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

Fourth, Section 1725 unquestionably leaves other methods of communication open to appellees. Even if appellees do not wish to use the mails, they may distribute their civic announcements to private homes in the area by placing the notices under the door or doormat, by hanging them on a doorknob, or by tacking or taping them to a doorpost or to the post on which the letter box rests. Appellees may circulate their handbills through person-to-person distribution in public areas in the community, and they may also communicate by telephone or through advertisements in local newspapers. Appellees may put their flyers in boxes other than letter boxes that constituents have placed outside their houses (*e.g.*, boxes intended for daily newspaper delivery), and they may request local homeowners to install such an additional box, or to permit the civic associations to install one, where one is not already available. If a house has a door slot rather than a letter box, appellees may insert their notices directly through the slot (see note 2, *supra*).[10]

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[10] This case therefore is not like *Schneider* v. *State*, 308 U.S. 147 (1939), and *Martin* v. *City of Struthers*, 319 U.S. 141 (1943), in which local governments completely prohibited certain forms of communication. *Schneider* involved ordinances banning the distribution of handbills or circulars on all public streets. *Martin* involved an ordinance prohibiting distributors of handbills or circulars from knocking on doors, ringing doorbells, or otherwise summoning the occupants of a house to the door for the purpose of delivering the ma-

The evidence presented in the district court does not contradict anything in the preceding paragraph. The survey introduced by the Postal Service concerning the comparative effectiveness of different distribution methods showed that between 70% and 75% of the materials placed under doors or doormats or hung from doorknobs are found by the homeowner, whereas approximately 82% of the items placed in letter boxes are found.[11] This marginal difference can-

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terials to them personally. The ordinance effectively precluded the systematic face-to-face distribution of literature to householders in a particular neighborhood. No such general ban on a method of communication is at stake here.

Moreover, the government in this case has acted, not in the exercise of any general "police power" to regulate private conduct for the benefit of society as a whole, but rather as the proprietor of a particular economic enterprise, the postal system. The regulation at issue concerns only a part of that enterprise (*i.e.*, letter boxes), and it permits unlimited use of the enterprise's facilities upon payment of an appropriate fee. The "police power" ordinances at issue in *Schneider* and *Martin* did not merely require payment of a reasonable licensing fee as a condition for distributing handbills in a certain place or manner; instead, they flatly prohibited certain methods of distribution.

Finally, *Schneider* and *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938), are readily distinguishable from the present case because privately owned letter boxes intended for use by the Postal Service in the delivery of mail are not public forums in the same way that a community's streets and parks are. It cannot be said of letter boxes, as Mr. Justice Roberts wrote of streets and parks, that "they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (concurring opinion).

[11] The figures in the text are derived from Govt. Exh. D-1 (A. 165). By simple division, the statistics reproduced on page 8, *supra*, yield the results reported above.

not be of constitutional significance. The district court's purported "findings of fact" regarding the effect of Section 1725 on appellees' ability to communicate (J.S. App. 3a-6a) establish at most that the prohibition against the deposit of unstamped mailable matter in letter boxes makes it slightly more difficult for appellees to reach their constituents. In support of this conclusion, the district court cited such factors as the expense of mailing, the administrative burden of maintaining current mailing lists, the need for speed in giving notice, the vagaries of weather, and the presence of weatherstripping under the doors of many suburban houses. The constitutionality of an Act of Congress should not turn on such comparatively trivial considerations—some of which may even be within appellees' power to affect. The dispositive point is that alternative means of communication *are* open to appellees, even if they may be incrementally less effective.[12]

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[12] Although appellees' witnesses purported to identify several ways in which Section 1725 interferes with appellees' ability to communicate with their constituents, and although the district court relied on some of this testimony in its opinion (J.S. App. 5a-6a), the fact is that several of appellees' grievances concern not their *ability* to communicate effectively but rather their *preference* concerning the precise means to be employed.

For example, one of appellees' witnesses was asked by the district court whether civic association notices could simply be taped to the front doors of houses in the neighborhood involved. The witness responded (A. 43): "Your Honor, I think in many areas it would be alienating and offensive. I have never seen it done. If I used Scotch tape in my neighborhood, I predict there might be great resentment, and the meeting might be over before you got through." Another witness was asked whether she had ever made any effort to affix civic notices to doors of houses by using Scotch

The very existence of letter boxes, after all, depends on the Postal Service. If Congress had never created the postal system, or if the Postal Service did not require its customers to provide mail receptacles, or if the Postal Service determined that all mail receptacles should be locked and that only the mail carrier and the postal customer should have keys (as is in fact the case in many apartment buildings), appellees would be affected in substantially the same way as they are under Section 1725. Yet appellees

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tape or masking tape. She answered (A. 76): "Oh, I wouldn't think of that. The Scotch tape mars the paint. * * * [I]t would look ugly on the home, and it would take longer to do that." In addition, several witnesses testified that appellee civic associations do not wish to deliver their notices to the doorsteps of houses in the community because, if such materials are not promptly picked up by the residents, their presence outside the door tends to be an invitation to burglars (A. 43, 51-52, 75).

Such considerations, although obviously of some practical importance, are not related to the question whether Section 1725 unconstitutionally impairs appellees' freedom of expression. Appellees *are* able to communicate with their constituents, even though they may not distribute their circulars exactly as they choose.

Furthermore, appellees' financial health and their special need for speed in the delivery of their messages are not matters for which Congress may appropriately be held responsible under the First Amendment. The constitutionality of a federal statute as applied to a particular group cannot depend on peculiar characteristics that, to some extent at least, may be within the group's own control or on peculiar problems that the group faces in attempting to achieve its objectives. If such factors were in fact controlling, the validity of numerous federal laws and regulations, including virtually every provision in the Domestic Mail Manual, could only be established through a long series of ad hoc adjudications in federal courts throughout the country.

can hardly contend that the First Amendment compels Congress to maintain a postal system or that the Postal Service is constitutionally obligated to require its customers to provide unlocked letter boxes. Reduced to its essentials, however, appellees' argument in this case is not very different from such a contention. They assert, in effect, that because civic associations in the Town of Greenburgh find it most convenient to distribute notices and other materials by depositing them in letter boxes without paying postage, that option must remain available, despite the contrary determination of Congress, unless the Postal Service can demonstrate some compelling governmental interest that outweighs the civic associations' need for optimum communication with their constituents.

Appellees misconceive the applicable law under the First Amendment. As this Court reaffirmed last Term in *Consolidated Edison Co. v. Public Service Commission*, No. 79-134 (June 20, 1980), slip op. 5, "[a] restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable." See also *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-116 (1972); *Cox* v. *New Hampshire*, *supra*, 312 U.S. at 575-576. Such "time, place, or manner" regulations are permissible if they "serve a significant governmental interest and leave ample alternative channels for communication." *Consolidated Edison Co. v. Public Service Commission*, *supra*, slip op. 4-5. Because appellee civic associations can

unquestionably communicate with their members without putting unstamped mailable matter in letter boxes, the only remaining question is whether Section 1725 serves a "significant governmental interest."

That brings us to the fifth point that supports the constitutionality of the challenged statute. Section 1725 is a reasonable means of pursuing several legitimate governmental ends that Congress properly may seek to further through postal legislation. As the legislative history of the statute shows (see note 3, *supra*; J.S. App. 25a), Section 1725 is designed to prevent the dilution of mail revenues through the private delivery of unstamped mailable matter. This alone is a sufficiently significant governmental interest to justify the statute. See, *e.g.*, *National Association of Letter Carriers* v. *Independent Postal System of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); *United States Postal Service* v. *Brennan*, 574 F.2d 712 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979); *Associated Third Class Mail Users* v. *United States Postal Service*, 600 F.2d 824 (D.C. Cir.), cert. denied, 444 U.S. 837 (1979).[18]

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[18] The district court has enjoined enforcement of Section 1725 only with respect to appellee civic associations (and any civic association in the Town of Greenburgh that subsequently becomes a member in good standing of appellee Council) (J.S. App. 20a-21a & n.*). Although appellees and the district court have not expressed any objection to enforcement of the statute as applied to commercial enterprises, affirmance of the district court's judgment will almost certainly lead to further attacks on Section 1725 by business concerns that wish to circumvent the postal monopoly. In light of this Court's recent decisions regarding the protected status of commercial speech (see, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, *supra*; *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765

In addition, Section 1725 plays a role in protecting the security of the mails from theft and tampering and in promoting the efficient delivery of the mails. Congress could properly be concerned with preventing theft, not only of items delivered by mail carriers to letter boxes, but also of money and mail placed in letter boxes by postal customers for collection by the carrier.[14] Moreover, by prohibiting the deposit of unstamped mailable matter in letter boxes, Section 1725 helps to avoid overcrowding, and it also eases the burden on mail carriers, who must separate unstamped materials deposited in letter boxes from items of mail left in letter boxes by postal patrons for collection. By banning *all* unstamped mailable matter from letter boxes, Section 1725 avoids the need for mail carriers to classify such materials into lawful and unlawful categories.[15]

(1978); *Consolidated Edison Co.* v. *Public Service Commission, supra*), the outcome of such challenges would be quite problematical if the decision now under review were sustained.

[14] DMM 156.4 expressly authorizes rural postal customers to leave mail and money for postage in letter boxes for collection by the carrier. Although the DMM does not contain a similar provision applicable to postal patrons in urban areas, the Postal Service's Methods Handbook governing "City Delivery Carriers Duties and Responsibilities" instructs carriers on urban routes to "accept letters for mailing from customers" and to "[c]ollect prepaid letters placed next to, in, or on private mail receptacles when delivery is being made at that point." Handbook 122.12, 132.12. Under 39 C.F.R. 211.2(a)(3), Postal Service handbooks are included within the regulations of the Postal Service.

[15] If the district court's judgment is affirmed, it is reasonable to expect that more unstamped mailable matter will be placed in letter boxes. A carrier finding mailable materials in a letter box will presumably be required to sort them into three groups: (i) unstamped civic association items, which

Finally, Section 1725 provides a significant protection for the privacy interests of postal customers. The statute permits patrons to send and receive mail without fear that the identities of their correspondents will become known to community activists or others who seek to use letter boxes for their own purposes.[16] Cf. *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (emphasizing the security of the mails from inspection).

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must be left undisturbed; (ii) unstamped commercial materials, which must be returned to the local post office, under DMM 146.12, 146.22; and (iii) postage-paid items left by the postal patron for collection by the carrier or mail placed in the box by the carrier on an earlier occasion but not yet collected by the patron. Although the district court refused to accept the testimony of a Postal Service witness that the additional administrative burden can be expected to cost approximately $160,000 daily if imposed nationwide (A. 144; J.S. App. 10a-11a), there is little question that application of the district court's ruling throughout the country would entail substantial expense, even if the precise amount is indeterminate. In addition, it will be impossible for a mail carrier to determine, simply by examining unstamped civic association materials, whether those materials have been properly delivered by association members themselves or whether they have been improperly delivered by a private competitor of the Postal Service, in violation of the Private Express Statutes, 39 U.S.C. 601-606 and 18 U.S.C. 1693-1697.

[16] The district court erred in concluding that the Postal Service may not raise postal patrons' privacy interests as a legitimate legislative concern supporting the enactment of Section 1725. Such notions of standing have no place in assessing the constitutionality of a federal statute. Congress has undoubted authority to enact legislation protecting the privacy of users of the mails. *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970). See *Carey* v. *Brown*, No. 79-703 (June 20, 1980), slip op. 15; cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302-304 (1974).

Notwithstanding the legitimate governmental purposes served by Section 1725 and the alternative means of communication open to appellees, the district court invalidated the federal statute. The court assumed improperly that, when the First Amendment is involved, the judicial task on review of an Act of Congress is to weigh the effects of the statute on free expression against the governmental interests advanced and to sustain the law only if the latter outweigh the former. This may be the appropriate approach when Congress attempts in some way to regulate the content of speech, but it has no application to a content-neutral statute that is "narrowly tailored to further [the government's] legitimate interest" and that affects only the place and manner in which communication may occur. *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116-117. When other effective methods of expression are available and when the governmental interests at stake are legitimate and significant, a reviewing court's task is at an end. The court may not conduct its own balancing of the competing concerns and decide how it would accommodate those interests if it were in the position of Congress. Even where First Amendment values are implicated, this Court has acknowledged that the Judicial Branch "must afford great weight to the decisions of Congress * * *." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973), quoted in *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980) (Burger, C.J.), slip op. 20-21. The district court in the present case failed to heed that admonition.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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MARCH 1981

APPENDIX

For Release in MORNING PAPERS of
WEDNESDAY, JANUARY 3, 1934

INFORMATION SERVICE
POST OFFICE DEPARTMENT

In response to numerous complaints which have been received at the Post Office Department against the use of letter boxes as receptacles for such mailable matter as statements of account, sales bills, advertising circulars and the like, Postmaster General James A. Farley, last night signed an order amending the Postal Regulations, designed to alleviate this ever-growing annoyance to patrons of the Postal Service.

The amended postal regulation which instructs the carrier to remove from letter boxes or other mail receptacles mailable matter on which no postage has been paid and carry such mailable matter to the post office to be held for postage and treated as prescribed by section 723 of the Postal Laws and Regulations, now reads as follows:

> "Private mail receptacles shall be used to facilitate the delivery of mail. When designated by the owner or user thereof for the purpose of receiving mail, all rules and regulations affecting the use of such receptacles issued by the Postmaster General shall be effective and apply to such receptacles.
>
> "Every such private mail box or other receptacle intended for use for the receipt or delivery of mail matter by any city or village letter carrier shall be used exclusively for the reception of matter regularly in the mails, and any mail-

able matter, such as statements of account, circulars, sales bills, or other like matter, deposited therein shall be treated in accordance with the rules governing the mails, including the proper addressing and the payment of postage at the regular rate.

"When a carrier finds deposited in such a mail box or other mail receptacle mailable matter on which no postage has been paid, addressed to or intended for the person in whose box it is deposited, he shall take such matter to the post office to be held for postage and treated as prescribed by section 723."

Patrons of the Postal Service throughout the country have deluged the Department with complaints that their private letter boxes have been cluttered with all kinds of advertising matter, circulars, statements, bills, political handouts, tickets of all kinds, bargain sale announcements, etc.

In many instances letter carriers have found it difficult to deposit mail in the overcrowded letter boxes, and in the larger cities that has worked considerable hardship on the carrier with a resultant lost of time.

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No. 80-608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE APPELLANT

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE APPELLANT

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, the Solicitor General, on behalf of the United States Postal Service, moves for leave to file the attached supplemental brief.

The issue on this appeal is whether the prohibition in 18 U.S.C. 1725 against the deposit of mailable matter into letter boxes without payment of lawful postage is unconstitutional as applied to the member associations of appellee Council of Greenburgh Civic Associations. Appellees now have moved to file a supplemental, post-argument brief in which they contend that they are exempt from the prohibition in 18 U.S.C. 1725 by virtue of an exception in the criminal Private Express statutes, 18 U.S.C. 1696(c).

Appellees concede (Motion, at 1) that they did not raise this statutory argument in their brief on the merits and that they attempted to rely on it for the first time in this Court

during oral argument. " 'The fact that the issue was mentioned in argument does not bring the question properly before [the Court]' " (*Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977), quoting *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954)). Nor can appellees' failure properly to present the issue be excused in the circumstances of this case. They made the same argument—in a similarly belated fashion—during the first round of proceedings in the district court, when they contended for the first time in their reply brief on the government's motion to dismiss the complaint that 18 U.S.C. 1696(c) excuses them from the requirements of 18 U.S.C. 1725. See J.S. App. 31a n.4. The district court rejected this contention (*ibid.*), and appellees did not renew it in their brief on appeal from the district court's order dismissing the complaint. Because appellees long ago abandoned their statutory claim based on 18 U.S.C. 1696(c), they should not be permitted to resurrect it at this late date.

However, because the Court has not yet ruled on appellees' motion to file their supplemental brief, the attached brief is submitted to express the views of the Postal Service on this issue in the event the Court chooses to consider it.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05

In the Supreme Court of the United States

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SUPPLEMENTAL BRIEF FOR THE APPELLANT

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1. Appellees' contention, raised in their supplemental brief, that 18 U.S.C. 1696(c) exempts them from the prohibition in 18 U.S.C. 1725 is without merit. Appellees note that postage ordinarily must be paid on a letter or similar item both when it is sent through the mails and when it is carried "out of the mails." 39 U.S.C. 601(a).[1] In addition, the criminal Private Express statutes generally prohibit the private carriage or conveyance of letters over established mail routes by regular trips or at stated periods. 18 U.S.C. 1694, 1696(a). Congress has exempted from the criminal Private Express statutes the carriage of letters that relate to the "business of the carrier" (18 U.S.C. 1694) and the conveyance or transmission of letters "by private hands without

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[1] 39 U.S.C. 601(a) provides that "[a] letter may be carried out of the mails" when certain conditions are satisfied, including that "the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope."

compensation" or "by special messenger employed for the particular occasion only" (18 U.S.C. 1696(c)). The Postal Service has recognized similar exceptions to the requirements of 39 U.S.C. 601(a). See 39 C.F.R. 310.3. Appellees argue that these explicit exceptions from the Private Express statutes implicitly also carve out an exception to the prohibition in 18 U.S.C. 1725 against the deposit of mailable matter in letter boxes without payment of postage. Thus, in this case, appellees assert that the distribution of their circulars by volunteers is "by private hands without compensation" for purposes of 18 U.S.C. 1696(c)[2] and that, as a result, the deposit of the circulars in letter boxes without payment of postage is not barred by 18 U.S.C. 1725.

Appellees fail to recognize that the Private Express statutes and 18 U.S.C. 1725 are addressed to quite different concerns. The Private Express statutes proscribe the carriage or conveyance of letters out of the mails; the exceptions to those statutes, where they apply, therefore merely permit a person to carry or convey letters out of the mails without payment of postage. Section 1725, on the other hand, requires payment of postage for the use of a facility—the letter box—that is used for the delivery of letters that are carried *in the mails*. Accordingly, the fact that appellees may be permitted to distribute their circulars out of the mails without payment of postage does not imply that they may avoid payment of postage even when they use part of

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[2]Quite aside from the explicit *exceptions* to the Private Express statutes, the term "letter" is defined in the pertinent Postal Service regulations in a manner that excludes from coverage under those statutes any circulars that are not directed to specific persons or addresses but are, instead, distributed in a blanket fashion to all residences in a locale. See 39 C.F.R. 310.1(a)(3), as added, 45 Fed. Reg. 59873 (1980). However, as we explain in the text, whether or not appellees are exempt from, or even subject to, the Private Express statutes in their delivery of circulars out of the mails has no bearing on the application of Section 1725.

the postal delivery system in the course of their distribution. See 45 Fed. Reg. 56055 (1980).

In addition, the background of 18 U.S.C. 1725 demonstrates that it was enacted for the very purpose of preventing persons who could lawfully *convey* circulars and similar items out of the mails without payment of postage from using letter boxes, free of charge, to deposit those items at their destinations. The Committee reports on Section 1725 observe that business concerns had adopted the practice of having their bills and other materials delivered by private messenger[3] but using letter boxes intended for the mails to effectuate the delivery. H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934), quoted in our opening brief (at 4 n.3). Congress concluded that this practice was depriving the Post Office Department of revenues because, Congress believed, these items would be sent through the mails if the senders could not deposit them in letter boxes free of charge. *Ibid.* The same point was made during the floor debate on the predecessor bill in 1932, when Representative Mead explained that "where some large corporation withdraws a volume of mail from the Post Office Department and sets up a service of its own, we restrict the use of the mail receptacles to mail matter handled by the Post Office Department" (75 Cong. Rec. 5577 (1932)). Therefore, the fact that appellees, like the companies discussed in the legislative history, might claim an exemption from the Private Express statutes does not also implicitly exempt them from the separate prohibition in 18 U.S.C. 1725.[4]

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[3]Companies using their own employees to deliver bills to customers would have fallen within the "business of the carrier" exception to the Private Express statutes, first enacted in 1909 (Act of Mar. 4, 1909, ch. 321, Section 184, 35 Stat. 1124) and now codified at 18 U.S.C. 1694. See also 39 C.F.R. 310.3(b).

[4]Moreover, an exemption from the Private Express statutes relating to the private carriage of letters does not render less important the

Indeed, appellees' argument that an exemption from the Private Express statutes necessarily implies an exemption from 18 U.S.C. 1725 as well would render the latter section superfluous. Where the Private Express statutes apply, the private conveyance of a letter without payment of lawful postage is illegal, whether or not the letter also is deposited in a letter box without payment of postage. Thus, it is only where the Private Express statutes do *not* apply and the letter therefore may be lawfully conveyed out of the mails without the payment of postage that the prohibition in 18 U.S.C. 1725 against deposit of a letter in a letter box without payment of postage has any independent force. Yet under appellees' argument, 18 U.S.C. 1725 would not apply in these very situations.

Appellees observe (Supp. Br. 1-2), however, that 18 U.S.C. 1725 prohibits the deposit into letter boxes of mailable matter on which no postage has been paid only when done "with intent to avoid payment of lawful postage thereon." In appellees' view, one must look outside of Section 1725 to determine when "lawful postage" is due. Because they assertedly are excused from the payment of postage for the conveyance of their circulars by volunteers, they contend that there is no lawful postage due on these circulars and that the volunteers who deposit the fliers in letter boxes without postage therefore do not have the requisite "intent to avoid payment of lawful postage." But contrary to appellees' contention, it is not necessary to look outside of Section 1725 to determine whether postage is due on material deposited in letter boxes. Section 1725 bars the deposit into letter boxes of "*any* mailable matter * * * on which no postage has been paid" (emphasis added). Thus, Section 1725 itself requires payment of postage for use of a letter

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accomplishment of the other purposes furthered by 18 U.S.C. 1725—preventing the clutter of letter boxes, protecting the privacy of postal patrons, and enforcing postal theft statutes. See Brief for the Appellant, at 4 n.3, 20-22, App. 1a-2a; Reply Brief, at 2-4.

box, irrespective of whether some other statute also requires payment of postage for conveyance of the material prior to the point of its deposit in a letter box. The phrase on which appellees rely, referring to an intent to avoid payment of lawful postage, appears to have been designed only to excuse from *criminal* liability persons who deposit unstamped material into letter boxes by mistake or without being aware that postage must be paid on the material. The absence of criminal intent, of course, does not excuse the depositor from civil liability for the amount of postage due on such material. See Domestic Mail Manual, Pts. 146 and 151.[5]

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[5]In a separate argument, appellees suggest that no fee for the deposit of material into a letter box "can be justified here, where appellees use no services of the Postal Service whatever" (Supp. Br. 3). Appellees are in error. If appellees were to use letter boxes for deposit of their circulars, they would benefit from the federal criminal statutes that protect letter boxes and material placed in them, as well as from the services of letter carriers and other personnel who enforce those statutes. In addition, Congress concluded that the clutter caused by deposit of such material itself warrants the imposition of a postage fee and that imposition of a fee for the use of letter boxes would constitute a reasonable incentive for senders of messages to use the mails. Appellees have not challenged the *amount* of postage due on the ground that they use only a limited portion of the postal delivery system. But such a challenge would be without merit in any event, because Congress and the Postal Service are not required to apportion postal charges according to the precise extent to which each individual letter burdens the postal system.

For the foregoing reasons, it is respectfully submitted that appellees' statutory argument based on 18 U.S.C. 1696(c) should be rejected.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05

NO. 80-608

APR 13 19
ALEXANDER L. S
CLERK

Supreme Court of the United States

OCTOBER TERM 1980

UNITED STATES POSTAL SERVICE,

Defendant-Appellant,

vs.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS,

and

SAW MILL VALLEY CIVIL ASSOCIATION,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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April 1981

QUESTION PRESENTED

May Congress, under criminal sanction of 18 U.S.C. Section 1725,* constitutionally deprive (a) non-commercial civic groups, (b) candidates for public office, or (c) municipal governments of access to traditional, community-sanctioned use of privately owned residential mail receptacles, effectively denying to the non-affluent citizen majority:

(1) the only meaningful, effective and practicable means to exercise First Amendment rights of free speech, and cognate rights of peaceable assembly and petition for redress of grievances, thus confining such rights to those with financial means sufficient to sustain the Postal Service de facto "stamp tax" levied on ideas, political expression and

*18 U.S.C. Section 1725 prohibits non-postpaid deposit of mailable matter, without apparent restriction on non-mailable matter.

association, and

(2) the only meaningful, effective and practicable means to enjoy the penumbral First Amendment right to receive the information essential to participate in and preserve the guaranteed Republican Form of Government?

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Hiett v. United States, 415 F.2d 664, cert. den. 397 U.S. 936 47,101
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Jarecki v. G.D. Searle Co., 367 U.S.303 108
Jones v. North Carolina Prisoners Labor Unions, Inc., 433 U.S. 119 104
Kusper v. Pontikes, 414 U.S. 51 84
Lamont v. Postmaster, 381 U.S. 301 71,86
Leach v. Carlile, 258 U.S. 138 47
Lehman v. City of Shaker Heights, 418 U.S. 298 104
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 72, 86, 91
Lovell v. City of Griffin, 303 U.S.444 62-63, 71

Cases--Continued

Mancuso v. Taft, 476 F. 2d 187	80
Martin v. Struthers, 319 U.S. 141	55-57, 70,81, 86,98 103
McCrossen v. United States, 339 F. 810	48
Mills v. Alabama, 384 U.S. 214	84, 93
Milwaukee Pub. Co. v. Burleson, 255 U.S. 407	46-47
Murdock v. Pennsylvania, 319 U.S. 105	102
NAACP v. Button, 371 U.S. 415	106
New York Times v. Sullivan, 376 U.S. 254	81
P.A.M. News Corp. v. Butz, 514 F. 2d 272	94
Public Clearing House v. Coyne, 194 U.S. 497	61-62
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367	85,108
Rewis v. United States, 401 U.S. 808	103
Rowan v. Post Office Dept., 397 U.S. 728	58,92, 103
Schneider v. Smith, 390 U.S. 17	49
Schneider v. State, 308 U.S. 147	69,70, 103
Schwartz v. Romnes, 495 F. 2d 844	104
Talley v. California, 362 U.S. 60	100-101
Thomas v. Collins, 323 U.S. 516	59,68, 79,100
Thornhill v. Alabama, 310 U.S. 88	65
Troyer v. Babylon, 483 F. Supp. 1135. affd. 628 F. 2d 1346, affd. No. 80-333 (November 17, 1980)	89-90, 98,103, 104-106

Cases--Continued

United States v. Baranski, 484 F. 2d 556 — 51, 88-89, 102

United States v. Cruikshank, 92 U.S. 542 — 68

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 — 108

United States v. Wiltberger, 5 Wheat 76 — 104

Whitney v. California, 274 U.S. 357 — 67,87, 99

Wolin v. Port of New York Authority 392 F. 2d 83 — 64, 72-74

Zuber v. Allen, 396 U.S. 168 — 108

Constitution, statutes, rule and regulations:

United States Constitution:

Article I, Section 8, Clause 7 (Post Office Clause) — 44-64, 46

Article IV Section 4 (Guarantee of Republican Form of Government) — 5,35 67

First Amendment — passim

18 U.S.C. Section 1708 — 55

18 U.S.C. Section 1725 — passim

39 C.F.R. Section 134.53 — 24

39 C.F.R. 146.2 — 48,95

Miscellaneous:

Internal Revenue Code of 1954

Section 501 — 22

Section 501(c)(4) — 22

Miscellaneous:

Treasury Regulations
Section 1.501(c)(4)-1 22
Walter F. Brown, Office of the Postmaster General, March 4, 1932 Letter to Hon. James M. Mead, Chairman, Committee on the Post Offices and Post Roads, on H.R. 9262 to amend 18 U.S.C. Section 321 18,1a
Zachariah Chafee, Free Speech in the United States p. 31 82
The Blessings of Liberty pp 150-151 82
Archibald Cox, 94 Harvard L.R. 1,3 (1980) 83
Thomas I. Emerson, The Rights of Americans, p. 212 71
The System of Freedom of Expression, p.286, 628-29 70-71
72 Yale L.J. 877, 934, 954 86-87, 82
Goodman and Dolan, Economics of Public Policy, p. 138 22
Learned Hand, Proceedings of a Special Session of the United States Court of Appeals for the Second Circuit held April 10, 1959 in Commemoration of Fifty Years of Federal Judicial Service by the Honorable Learned Hand, Clark, C.J., presiding, 264 F. 2d 6, at 35 61
Oliver Wendell Holmes, The Common Law, p.1 (1881) 96
Gerald W. Johnson, The First Freedom, p.456 69

Miscellaneous:

Levy, Freedom of Speech and Press in Early American History, p.309	96
James Madison, The Federalist, Paper No. 42	59
August 4, 1822 Letter to W.T. Barry, 9 The Writings of James Madison 103 (G.Hunt ed. 1910)	41
Alpheus Mason, The Supreme Court: from Taft to Burger, p. 156	70
John Milton, Areopagitica	76
Alexis de Tocqueville, Democracy in America pp. 191, 404 (Alfred A. Knopf 1945)	60,67, 83

No. 80-608

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE,
Defendant-Appellant

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS
and
SAW MILL VALLEY CIVIC ASSOCIATION,
Plaintiff-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF
for the
PLAINTIFF-APPELLEES

STATEMENT

The plaintiff civic organizations, appellees (sometimes referred to as respondents), instituted the action below seeking declaratory and injunctive relief against the appellant, United States Postal Service (defendant below), on the grounds that the provisions of 18 U.S.C. Section 1725 effectively interdicted the most basic rights guaranteed under the First Amendment.*

I. The Civic Associations.

Respondents are non-partisan, non-commercial citizen-civic organizations whose communications constitute a "very essential part" of the governmental and "political process"(J.A. 56)**. Their essential function is to galvanize

*The decisions below are contained in appellant's jurisdictional statement.

**J.A. references are to the Joint Appendix page number.

the citizenry into an awareness of its responsibilities to the orderly, efficient and honest operations of government.

Civic organizations encompass upper income areas (J.A. 31, 84), middle income areas (J.A. 31, 32), and lower income areas (J.A. 31, 32, 58), with citizens therein residing in all kinds of dwellings (J.A. 31), and representing in essence the entire cross section of America, from the most rural to the most urban (J.A. 31, 32, 34) and the most affluent to the most economically disadvantaged (J.A. 31, 32, 48).

Civic associations vary in size from 1,000 or more (J.A. 135) to substantially less than 200 (J.A. 35). Their financial structure is tenuous with annual dues ranging from $2.00 to $10.00 (J.A. 35, 61, 132) per family unit, in many cases voluntary dues remaining uncollected, particularly in low income areas. In most

cases a figure of approximately $150.00 or less constitutes the aggregate civic organization treasury balance (J.A. 35, 132), permitting at most one small mailing per year, totally insufficient to cover the wide ranging civic issues which blanket any community. Indeed, civic groups recognize the urgent necessity to distribute as frequently as monthly and certainly no less than quarterly (J.A. 82, 110, 132). Civic groups encompass not only those paying dues, but also the greater number of non dues-payers. (J.A. 40, 48, 86, 89, 115, 134).

II. Respondents' Non-Commercial First Amendment Distributions.

The respondents' distributions by means of volunteer civic mailbox deposit without postage are at the essence of grass roots democracy. The civic communications interdicted by the punitive statutory governmental action range from partisan

political campaign material (J.A. 47, 52, 136) to dissemination of civic news matter (J.A.63-64, 110), much of which may be euphemistically described as a call to civic arms.

Respondents' distributions do not comprise well financed, high-powered newspapers; rather, they consist of the type of plain pamphleteering which constitutes the sole resource available for the great mass of the American populace which must band together in civic groups to disprove the old adage that "you can't fight City Hall". If civic groups are denied the right to distribute in the manner sought to be suppressed by 18 U.S.C. Section 1725, the First Amendment may continue to exist on paper, but its use as a meaningful tool will be available only to the oligarchy of the economically and politically affluent.

The speech here sought to be metered by a postal toll gate embodies the most

vital concerns of a free people: how and by whom shall we be governed, indispensable to that Republican Form of Government embodied by the Founding Fathers in the Constitution. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

The respondents and others testifying below are involved in extensive lobbying for public interest legislation on behalf of their constituents (J.A. 134), in interacting with government fire protection (J.A. 107) and others in the areas of municipal services (J.A. 103), school services (J.A. 85) and patterns (J.A. 167), landlord-tenant abuses and corrective legislation (J.A. 168), public interest litigation on behalf of the citizenry, police protection, traffic problems, bicycle safety, land use zoning and planning, traffic and general environmental

protection of minority residential neighborhoods, the representation of low income tenants before unresponsive municipal housing authorities (J.A. 173, 174), opposition to governmentally supported referenda in derogation of the citizens' best interests, municipal budgeting, candidate forums, youth employment, planning, community beautification (T.P. 244-245)*, municipal charter revision (J.A. 134), and virtually every issue that conceivably impacts upon any community (J.A. 170).

The respondents, in addition to materials distributed on emergency bases (J.A. 37, 57, 63, 85, 90, 135), seek to inform the citizenry of community functions by means of humble newspapers distributed on such regular intervals as are permitted by the strictures of economics, available

*T.P. references are to pages of trial transcript.

citizen volunteers and the logistics of time (J.A. 110-111, 132).

Those civic newsletters are utilized to make contact with new residents in the community, to recruit future civic leaders and share the storehouse of accumulated knowledge of local governmental operations (J.A. 57).

It is these vital civic distributions which a Postal Service, insensitive to First Amendment rights and preoccupied with fiscal concerns, would seek to restrict in order to sustain a statute which the record demonstrates (a) has been subject to widely disparate degrees of enforcement and (b) serves no bona fide purpose in terms of the constitutional governmental authority to assure the orderly and secure delivery of the mails.

III. Absence of Alternatives.

This Court has given consideration to the crucial question of whether a party

alleging First Amendment constitutional infringements has available any meaningful and effective alternative to the prohibited method. The trial record shows clearly that practicable "alternate means" to avoid the burdens of the statute do not in actuality exist. Affixation of civic fliers or newsletters to "door knobs" or "door handles" has been shown to be totally unreliable in terms of the likelihood of delivery, due in no small part to the "vagaries of climate" alluded to by the Court of Appeals in this case at 586 F. 2d 935, 938 (2d. Cir. 1978) (J.A. 41, 59, 75, 111). Hanging civic distributions on door knobs while possibly of use in political campaigns of affluent candidates, are wholly impractical for civic use, both by reason of economics, logistics of time (J.A. 53, 54) and non-feasibility for use as an informative newsletter (J.A. 58, 59).

The Court of Appeals further alluded, in a footnote at 586 F. 2d 936 to "under

door delivery." Different structures and types of residences pose differing logistical problems. Private homes are now almost always, and even internal apartment doors are now often, equipped with storm doors or weather stripping which makes "under door delivery" physically impossible (J.A. 52, 42, 109).

At least three other alternate means of delivery of civic fliers have been considered, with various hybrid methods being suggested for different types of structures. The District Court suggested that scotch taping of civic fliers to doors might be a feasible alternative means of delivery (J.A. 165). Experienced civic distributors propounded cogent reasons why this was neither practical nor appropriate. Foremost is the basic question of unreliability of delivery, due largely to the vicissitudes of weather. (J.A. 43-44, 59). Scotch tape delivery has been found

not viable for other practical reasons as well.*

A civic flier flapping on the front door of a private residence, or even in an apartment house, is clear notice to the potential burglar of a vacant residence (J.A. 53). Almost any of the alternative possible physical methods of delivery -such as "door handles", placement on or under door mats, insertion in or behind storm doors -even if logistical inadequacies or impossibilities of deliverability could be overcome - pose the same threat to the neighborhood security, or as one civic-political activist stated: "It was a signal to every junkie in the neighborhood." (J.A. 53).

*It has been stated that use of scotch tape may tend to mar the home (J.A. 41), it imposes a substantial time burden when hundreds of civic fliers are being distributed (J.A. 59), and people tend to resent same as an imposition, as is also the case with other non-mailbox methods which people resent as being a cause of litter (J.A. 41, 42).

Delivery and placement of civic fliers by procedures alternative to non-postpaid mailbox deposit have other significant detriments: added cost, delay, physical impossibility, a serious burden to the environment and increased costs of municipal government by exacerbating the litter problem. (J.A. 103, 104, 227).

Attempting to place material on mats, behind storm doors, on handles, telephone communications, etc. engender still further problems. All have proven totally impracticable and ineffective, whether due to "vagaries of climate", inadvertent removal or other cited reasons. The trial testimony incontrovertibly demonstrates the total unreliability of delivery by any alternative method, a prejudicial situation which reflects the essence of respondents' First Amendment claims. The same Court which at first summarily dismissed the cause below determined these factual issues

at trial conclusively in favor of the respondents (490 F. Supp. 157).

The testimony of the Postal Service's experts confirms that the only "secure place" (J.A. 75), and "the safest place is a mailbox" (J.A. 131). The Postal Service survey confirms that there is an 11 percent greater reliability of deliverability for mailbox deposit, as opposed to alternate physical means (J.A. 165). As the District Court noted, ". . . half again as many proportionately, were not found where the notice was placed on the doorknob or under the mat," as opposed to placement in the mailbox (J.A. 153).

The methodology utilized by the Postal Service expert was inherently defective. First, the weather on the day of distribution of the survey material was "nice weather" (J.A. 154). Civic witnesses confirm that weather is a critical factor in terms of reliable delivery methods

alternative to mailbox deposit (J.A. 110). Had weather conditions been adverse on the survey day, the deliverability percentage of non-mailbox deposits would have been substantially decreased, and the reliability factor for mailbox deposit proportionately increased. The trial judge took judicial notice of the impact of the unpredictable vagaries of the weather upon this more hazardous alternative (T.P. 536).

Secondly, the survey permitted a call-back only on the evening of delivery (T.P. 505). Respondents established that the mailbox is clearly the most "secure place" and the "safest place" in terms of weather and perhaps mischievous children (J.A. 59); it is evident that items placed in a mailbox remain in a secure state and may be found within the next twenty-four hours, climactic conditions notwithstanding. This is not the case with respect to the alternative methods; again the

survey is biased against mailbox deposit.

The alternative methods of delivery suggested by the Postal Service are further dependent upon the ability to ascertain definitively the recognizable front door to a dwelling. However, in many areas there is no clearly recognizable customary entrance where the civic flier could be placed with any reasonable assurance that it would ever be received (J.A. 84, 162-16; T.P. 168). This significant variable negates all possible alternatives, the mail receptacle remaining the only site where reasonable reliability of delivery is assured. The survey utilized delivery at the apparent architectural front door of the dwelling, in an area where residents do not invariably use the front door as an entrance (T.P. 608, 609). The deficiencies in the survey are evident, yet it still demonstrates a much greater deliverability factor by the use of the mailbox.

The Postal Service has suggested that civic associations purchase a second mail receptacle near their regular mailbox, to be used as a depository for civic or political fliers. This type receptacle is certainly atypical (J.A. 401, 620); and civic experts have confirmed that it is impractical and uneconomical, both on private homes and on federally subsidized housing, where such additions would probably be unlawful (J.A. 47), as well as beyond the modest means of most civic treasuries.

IV. Long Standing Custom - The Citizens' Right to Receive.

As the District Court noted, 18 U.S.C. Section 1725 is honored more in the breach (T.P. 129), and is enforced more zealously in certain areas than others (J.A. 132), just as is so with the Postal Service's delivery standards (J.A. 147).

Respondents claim no intended discriminatory enforcement of the statute; yet it is evident that non-postpaid mail receptacle deposit is a custom of long standing, commonly accepted and expected by the citizenry, a prevalent practice for several decades". 586 F. 2d at 937, fn. 1. (J.A. 33, 74 107, 110). One resourceful New Jersey municipality has been utilizing this procedure "for so long that it just seems a way of life" (J.A. 127, 131).

The Postal Service's concern for handicapped citizens ("operation alert"), supports respondents' position. Permitting people to leave cash in lieu of postage has become an accepted practice recognized by the Service "to fill the needs of the community" (J.A. 149). While laudable, the program presents a situation no different from civic use of non-postpaid deposit to fill a need equally vital, the exercise of First Amendment rights to make government

more responsive to the will of the people. Neighborhood solicitation for recognized charities and concern for senior citizens, physically unable to receive civic notices in locations other than mail receptacles, further necessitates non-postpaid mail deposit (J.A. 75). Surely this presents a community need of equal status, albeit neither may be of First Amendment stature.

It was conclusively established that no citizen objections have ever been made to civic association non-postpaid mail receptacle deposit of non-commercial civic notices* (J.A. 32, 51, 62, 74, 107, 113, 135). It is equally evident that the great mass of the citizenry expects to receive civic, political and public interest oriented notices deposited without postage in their mail receptacles, that they act and

*The Press Release appended to the government's brief (1a) demonstrates that the only record of citizen complaints was in 1934 and related mainly to commercial matters.

depend upon same as a means of keeping informed on community matters (J.A. 74, T.P. 16), a conclusion based upon 140 years of cumulative civic personal experience (J.A. 51, 75, 107, 128).

It is not disputed that the citizen pays for and owns his own mailbox (J.A. 46). The Postal Service has recognized that people owning their own mailboxes frequently have an affirmative desire to receive non-postpaid materials at their homes.* Decades of accepted practice and community custom have rendered non-postpaid mailbox deposit of civic and political non-commercial materials essential to effective exercise of First Amendment rights. A flexible, meaningful Constitution must take

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*See Postmaster General Brown's March 4, 1932 Letter to Congress on proposed legislation, ultimately 18 U.S.C. Section 1725. The letter further noted "the questionable legality of such a measure." (Appendix to this brief, 1a) See also 586 F. 2d. at 937.

cognizance of the practical exigencies of contemporary society. The contrary view espoused by the Postal Service seeks to repudiate the realities of 20th Century society.

The Postal Service has recognized the mandates of a mechanized mail delivery and apparently decrees that "new homes" have their mail delivered by postal trucks at curbside "RFD" boxes (J.A. 111), The Postal Service has admitted that "curbline delivery," is being implemented "to avoid the postman having to get out and walk up to the front door of each house in order to save time and expense" (T.P. 476). The same rationale exists for civic representatives who deposit in homeowner mail receptacles (J.A. 83). Yet the Postal Service would claim such right for itself in the interests of time and expense, and deny same to the general citizenry which seeks

the same rights in the name of non-commercial free speech and free press.

The only citizen complaints ever received in response to civic or political distribution occurred when they were not deposited in mail receptacles, but rather when delivered by any of the so-called alternative methods suggested by the Postal Service, complaints engendered by litter problems (J.A. 51), notice to burglars of residents' absence (J.A. 52), or because of non-receipt (J.A. 51). Indeed, local police authorities have tacitly suggested the use of mailbox deposit in order to avoid an accumulation of material which may serve notice to potential felons (J.A. 52).

V. Bulk Mail or First Class Mail - Civic Impracticability.

First class mail rates are 18 cents per item and bulk mail (third class) is 10.4 cents per item. While civic groups may qualify, for the latter rate - notwith-

standing its clear impracticability of use as an effective means of communication (J.A. 61), both in terms of cost, undependability and logistics of time (J.A. 61, 75-76, 147) -there exists also a lower so-called non-profit rate of approximately 3.5 cents per piece.* Postal regulations expressly deny the availability of this rate to civic organizations (Postal Manual Section 134.53, "civic improvement organizations").** Bulk mail procedures mandate a minimum of 200 pieces per delivery, a $40.00 annual fee and an initial fee of $30.00. The only evidence on this issue reflects the Post Office denial of non-profit rate status to a local civic association (J.A. 133).

A certified public accountant, testifying for the respondent Saw Mill Valley

*Rates effective March 22, 1981, increased from 15¢, 8.4¢ and 2.7¢, respectively.
**The Court below concluded that the postal expert had testified that civic groups "may or may not be subject to . . . the non-profit rate" (T.P. 465).

Civic Association, a group engaged, inter alia, in legislative lobbying (J.A. 88), confirmed that the lower rate was not available, as the group could not qualify under Section 501 of the Internal Revenue Code of 1954 (J.A. 96). A civic association would have to qualify under Section 501(c)(4), a "civic league". An organization, such as the civic respondents, will not qualify if it is an "action organization" under Treasury Regulation Section 1.501(c)(4)-1.

The record is replete with testimony to the effect that the use of mail, whether first class at 18 cents, or bulk mail at 10.4 or 3.5 cents, is of no practicable use in terms of civic communications, due to its inherent logistical time problems* with respect to matters of vital community concern, continually arising on routinely

*"The Postal Service....handles third class mail on a deliver-it-when-we-get-around-to-it basis." Goodman and Dolan, Economics of Public Policy, p. 138 (West. 1979)

short notice* (J.A. 35-36, 63-64, 76, 114, 134-135). Municipal agendas are made available on such short weekend notice that any mail delivery, even first class, is far too time-consuming for civic efficacy (J.A. 23). The diverse civic issues reflect the urgent need to hand distribute (J.A. 171, 172, 173, 175). The use of bulk mail notices are often so tardy as to be received subsequent to the day of the meeting (J.A. 99).

Emergency meetings on vital community issues are so commonplace as to wholly destroy the practical utility of any mail procedures (e.g., J.A.114).* Even first class mail - mailed and received within one postal district - has been proven to be

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*Civic distributions are necessarily made by volunteers on weekends (J.A. 38). Cumbersome bulk mail procedures, coupled with weekend closing of post offices, render use of mails impossible for the typical urgent next week meeting (J.A. 60-61).

untimely (J.A. 85-86). The impact on optimum Postal Service delivery standards is materially affected by the priority to which third class mail is subject, in terms of its subordination to the completed handling of first class and "priority mail" (T.P. 429). "Different operating practices" are in effect at postal facilities throughout the nation (T.P. 429), rendering third class mail subject to the whim and caprice of divergent "customary operating procedures" of local postmasters.

While optimum standards require delivery of third class mail within a 48 hour period, it is evident that these are at best management standards and that delivery reliability "Nationwide varies dramatically, depending on the distance . . . and the transportation." (T.P. 364).

It has not been controverted that bulk mail procedures are impracticable as an effective means of communication because of its lack of feasibility in arousing the citizenry in sufficient time to alert them to issues and governmental meetings and because of the burdensome logistical problems inherent in its procedures (J.A. 60-61). Typically, between two-thirds and three-quarters of all civic groups are under 200 family units (J.A. 164), so that bulk mail is not even available for the majority of the civic community.

Finally, it has been confirmed that civic groups do not have even the limited funds to utilize the bulk mail procedures. (J.A. 36; T.P. 340-348). This is the case in lower socio-economic areas, and even in upper income areas (J.A. 84). Moreover, it is clearly not feasible to raise dues to meet mailing costs (J.A. 56; T.P. 348).

VI. The Alleged Statutory Purposes of 18 U.S.C. Section 1725.

The record confirms that any realistic burdens imposed upon the Postal Service, in the absence of the Section 1725 restrictions, are at the most marginal; certainly they do not rise to the stature of such pressing governmental needs as will justify the chilling First Amendment impact here imposed.

The facts demonstrate no substantial need for 18 U.S.C. Section 1725 in assuring secure delivery of the mails. The Postal Service argues that Section 1725 is essential to the Service's efforts to investigate internal theft, irrelevant in terms of citizens making a brief civic deposit (J.A. 70). That Section 1725 has been at best intermittently enforced obviates any force of this argument. This contention is based upon the police state mentality that "it creates suspicion if

anybody not in uniform goes up to the vicinity of a mailbox" (J.A. 71); yet the Service indicates that non-uniformed charitable solicitors or meter readers depositing in mailboxes do not create suspicion (J.A. 72).

Such a selective idiosyncratic application of the statute renders any positive purposes mere speculation. The invidious interpretation of the statute is documented by the Postal Service opinion that the approach of a non-uniformed individual to the area of the mailbox may be of a suspicious nature, but only in areas such as the South Bronx (J.A. 118-119) or with respect to a limited class of persons (J.A. 121).

The Postal Service has suggested that tubular receptacles in the vicinity of mailboxes may constitute a practicable alternative means of civic distribution. Why a non-uniformed person making a deposit therein, in the "vicinity of the mailbox,"

would not create suspicion, whereas depositing in the adjacent mailbox would do so, is unclear.

The Postal Service appears to argue that 18 U.S.C. Section 1725 is somehow necessary in order to enforce the Federal criminal law provisions relating to false representations through the mails, mail fraud, mail theft, pandering through the mails, etc., in that - absent 18 U.S.C. Section 1725 - "there is going to be a massive influx of thieves . . . posing as civic associations" (T.P. 273). However, none of these so-called fraudulent schemes have reference to non-commercial civic organizations. (J.A. 118).

The Postal Service's policy based on suspicions of non-uniformed individuals approaching the area of the homeowner's mailbox, is exemplified by one postal inspector

> People using the mailboxes for fraudulent criminal purposes ...frequently

> pose as a canvasser or solicitor and that's how they cover their other activities, their criminal activities.
>
> * * *
>
> The mail in the mailboxes would be more secure if people were precluded from approaching the vicinity of the mailbox.
>
> * * *
>
> By preventing anybody from using the mailbox in this fashion (in violation of 18 U.S.C. Section 1725), you will eliminate additional exposure to fraud and a possible haven for promoters to escape penalties of the mail fraud law (J.A. 119-120, 156; T.P. 578-580).

The foregoing reflects the view that to protect society against crime, actual and potential, government must eliminate all speech, the good and the bad alike. Only in this way can we eliminate the incipient criminal and create society devoid of criminality and immorality. Such an approach is anathema to every principle upon which our nation was established and the First Amendment ratified.

A postal inspector testified that 18

U.S.C. Section 1725 is helpful in preventing mail fraud. However, no civic groups have ever been involved in any of these investigations (T.P. 553,-555). Indeed, none of the Postal Service's examples of Section 1725 collections for non-postpaid matter deposited in mailboxes pertained to a civic organization. A national summary of alleged 18 U.S.C. Section 1725 violations for a 26 month period reflects NO RECORD OF ANY CIVIC VIOLATIONS (Respondents' Exhibit 48, J.A. 189-190).

In response to the Trial Court's inquiry as to the effect on postal surveillance if civic associations were permitted to deposit civic fliers, a postal inspector stated

> "It can only be a hindrance, I assume". (J.A. 161)

Respondents concede that the First Amendment -indeed the entire Bill of Rights - does present a hindrance to law enforce-

ment. It is obvious that a mere "hindrance" falls far short of such a governmental necessity or clear and present danger as to warrant the significant First Amendment restrictions here imposed.

VII. Civic Non-Interference With the Mails

There has indeed been wholesale violation of 18 U.S.C. Section 1725 by respondents, by political candidates, by municipal officials, and others, a customary practice over a period of many decades at least. The Postal Service has not submitted any facts - only hypotheses - that reflect any interference with or jeopardy to the security of the mails.

Civic witnesses verified (1) that they have never deposited civic material in an already filled receptacle or caused it to in any manner overflow (J.A. 39, 40, 55, 65, 128); and (2) that there has never been

any interference with any regular mail already in the receptacle.

The Postal Service has totally failed to demonstrate that the security or celerity of its regular mail has been impeded by civic actions in violation of 18 U.S.C. Section 1725. It has submitted only a factually inapposite time/motion study, relating to employee work standards, that asserts a detriment to mail delivery in terms of hypothetical dollars. Every constitutional provision designed to protect civil liberties imposes a burden upon government, the price for the privilege of being citizens in a Constitutional Republic. The Postal Service has tilted off center the balance wheel of the constitutional scales.

Conversely, the Service attempts to show that 18 U.S.C. Section 1725 generates revenue for the government. Even if arguably true, the constitutional response must be: The Bill of Rights cannot be

admeasured by matters of revenue. 18 U.S.C. Section 1725 is a criminal statute, not a revenue statute, and must be construed as such. It is evident that no significant collections have been made from civic associations (T.P. 576-78). The Postal Service's own records confirm that the program is not in fact cost productive. (J.A. 189-190). Moreover, constitutional freedoms cannot be weighed in the balance scale of the mercantile market, whatever the financial ledger may show.

Assuming that the civic associations were forced to cease their mailbox deposit, the Postal Service would nevertheless gain no additional revenue. It has been documented that civic groups cannot mail their notices; there would be no alternative except to cease distribution and thus no increase in postal revenue.

VIII. First Amendment Political-Municipal Expression

Municipalities have demonstrated both a logistical and financial need to distribute public interest notices in the same manner as respondents (J.A. 102-104, 107-108, 126-127). Municipalities have no practical alternative; for as with civic associations, so the municipality has a financial limit beyond which it may not responsibly escalate its tax levies, which have become increasingly subject to real and practical limitations (J.A. 103, 129).

Certain municipal distributions mandate mailbox deposit, no other procedure being possible (J.A. 103). The Hartsdale Fire District and the Borough of Millstone in New Jersey -a small but historic enclave -require mailbox deposit of critical citizen notices; and if denied the use of such a method, the distributions would, of necessity, cease (J.A. 235, 321). In respect to the Borough of Millstone, it would signal the end of a "way of life" for a people (J.A. 321-322) who, by their own

resources, a sense of independence and resourceful self-reliance, epitomize the values which have sustained our Republic.

What of the political process, so essential to a Republican Form of Government guaranteed by the Constitution? The political process is inherently interrelated with the civic process (J.A. 56). Political candidates are certainly within the scope of this litigation, as are municipal bodies such as fire districts (J.A.107).

Political deposit in derogation of 18 U.S.C. Section 1725 is a long established tradition, Political personnages have testified that such mailbox deposit is essential to political campaigns (J.A. 56). Politics would be for the rich alone if candidates, particularly independent-insurgents, were denied the right to deposit without postage in mail receptacles (J.A. 77). Campaign organizations for both our 38th and 39th presidents resorted to

this method of bringing their message before the electorate (Stipulation of Facts dated July 5, 1979, paragraphs 2 and 3, T.P. 181).

IX. The Chilling Impact of 18 U.S.C. Section 1725

Respondents have demonstrated that they have no practicable or effective alternative to non-postpaid deposit of "civic fliers" in homeowner mail receptacles. Civic and political activists have confirmed that the method of distribution in issue is "fundamental to the operation" (J.A. 137) of such effective non-commercial volunteer distribution, and there exists no practicable alternative (J.A. 33, 36, 39, 55, 57, 116).

Based upon cumulative civic experience of 140 years (T.P. 9, 77, 102, 147, 162-163, 182, 244, 332), it is clear that civic associations - if denied the right to non-postpaid hand deposit in homeowners' mail receptacles (1) could not

effectively serve their constituencies (J.A. 44-45); (2) could not effectively hold the meetings necessary to fight their community battles (J.A. 56); (3) could not effectively foster civic communication (J.A. 65, 76); and (4) could no longer be effective as viable community groups. The raison d'etre for their existence would vanish (J.A. 41).

The foregoing are expert opinions forged in the fires of practical civic experience. What actual results have ensued from the happenstantial efforts of the Postal Service to enforce 18 U.S.C. Section 1725? A White Plains New York civic group, under Postal Service threat (T.P. 338-339), has eliminated mailbox deposit, the net results being that (1) only dues paying members receive notices, i.e., approximately 150-200 out of a total of 1,000 and (2) drastically reduced meeting attendance (T.P. 343).

The respondent Council of Greenburgh Civic Associations, without funds for mailing (J.A. 78), was confronted in 1979 with a significant governmental reorganization referendum (J.A. 77), a referendum opposed in the face of influential support by the press (J.A. 78) and the Township, which expended public funds in support thereof (T.P. 158). Respondent - with a bank balance of $350 (J.A. 78) - expended $150 thereof (J.A. 80)* to deposit 10,000 fliers in homeowner mailboxes, in order to resoundingly defeat that proposal (J.A. 79). This is a typical example of successful grass roots plain pamphleteering in the face of powerful opposition, an effort doomed to failure had mailbox non-postpaid deposit been precluded. Citizens knowingly assumed the

*The trial transcript incorrectly stated the witness' answer as $150,000 (JA. 80). This was stipulated to between plaintiff and defendant below as being erroneous. (See appendix to this brief, 2a)

risks of 18 U.S.C. Section 1725, because of the import of the issue and the absence of any effective alternative. (J.A. 81).

Due to the June, 1976 threat of Section 1725 enforcement from the Postal Service (J.A. 24), Respondent Saw Mill was forced to suspend hand distribution to the bulk of its membership (J.A. 92), the prior procedure having been to mail to its minority of dues paying members and communicate with the greater majority of its members by hand delivered mailbox insertions (J.A. 92).

Saw Mill thereafter could hold no emergency meetings to consider numerous community issues. "As a result, the association is . . . almost dying" (J.A. 92-93).

Prior to June, 1976, 35 to 100 people customarily attended regular and special meetings of Saw Mill Valley (J.A. 93). In 1977-79, quarterly meetings had been eliminated as a result of in terrorem

elimination of hand delivered meeting notices (J.A. 92); and 15 to 17 persons attended the one regular annual meeting, less than a quorum (J.A.94).

For the period 1972-1976, the dues paying membership of Saw Mill Valley ranged from 107 to 130 (J.A. 89). No dues were collected after 1976, as a direct consequence of the Postal Service threat (J.A. 98-99, 100). The descending in terrorem spiral of civic activity caused by the Postal Service's enforcement threat has enfeebled the Saw Mill Valley organization, subjecting it to a vicious cycle of enforced censorship, causing a need to "revitalize our Association" (J.A. 101), a revitalization which cannot be effectuated without the traditional mailbox hand deposit system utilized so successfully prior to June, 1976. Were the Postal Service to be permitted to enforce 18 U.S.C. Section 1725, the result for civic groups throughout the nation would inevitably be

the same, except perhaps for a few enclaves affluent enough to defray the postal tariff. Citizens would then have but a theoretical right of free speech. Citizen frustration and apathy, which have fed disenchantment with the political and governmental process, would inevitably escalate. See letter from James Madison to W. T. Barry (Aug. 4, 1822). 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

SUMMARY OF ARGUMENT

The provisions of 18 U.S.C. Section 1725, as applied in the practical world of civic and political society, constitute a total interdiction of the citizen's ability to exercise rights of free press, free speech and assembly. Its chilling impact creates in essence a financial means test for First Amendment freedoms.

18 U.S.C. Section 1725 is, at most, a negligible weapon in the Postal Service's broad arsenal against mail related criminal

offenses. Respondents do not challenge the Postal Service's monopoly of mail delivery. Such groups, if denied their only effective and meaningful method of distribution, would be forced to cease distribution; no practical use could be made of regular mail procedures, and hence no material revenue considerations are here involved.

18 U.S.C. Section 1725 was enacted in the Depression era solely to preclude commercial entities from distributing in a manner competitive with the Post Office. It was not intended to prohibit customary methods of campaigning or to restrict distribution of non-commercial civic, public interest oriented material. The four corners of the statute, its history, and established principles of statutory construction permit no other conclusion.

The District Court sought to ascertain whether reasonable distribution alternatives existed. Contrary to the uncontroverted testimony, the Postal

Service argues that alternatives exist, but that civic groups "are reluctant to use these alternative channels." Respondents concede the availability of theoretical alternatives, but conclusively established at trial their impracticability. The "modest fee on ordinary postage" alluded to in the Postal Service brief - when multiplied a hundred-fold or more for civic groups, many in middle or low income areas - transforms a so-called "content neutral statute" into a total prohibition on the indispensable means of effective civic expression and the right of citizens to receive information on the operations of their government. The effect of such enforcement has been demonstrated as permitting only the affluent few to enjoy effective means of free speech, press and assembly.

Governmental and private functions daily intrude upon the privacy of citizens. Citizens seeking isolation from societal

pressures have means available to obtain such insulation, all without stilling the free flow of information. The so-called privacy interest of citizens is a postal distraction which does not here approach constitutional stature sufficient to justify the de facto oligopoly of the First Amendment brought about by the Postal Service's enforcement and application of 18 U.S.C. Section 1725.

ARGUMENT

POINT I

THE CONSTITUTIONAL POSTAL POWER IS SUBORDINATE TO THE BILL OF RIGHTS

The record conclusively demonstrates 18 U.S.C. Section 1725 presents an insurmountable burden to non-commercial civic, political and public interest oriented First Amendment communications. The Postal Service has submitted no countervailing evidence of constitutional stature. Any

category of regular mail has been demonstrated to be of little utility for civic expression, due to economics and logistical constraints.

The Postal Service, claiming that 18 U.S.C. Section 1725 aids its program of criminal law enforcement, argues that First Amendment communications should be curtailed because lawbreakers may attempt to pose as civic representatives. It may well be that the absence of 18 U.S.C. Section 1725 will hinder or inconvenience such efforts (J.A. 161). The constitutional right to counsel, against self-incrimination, and the ban on unreasonable search and seizure have imposed demonstrable material burdens upon the government, both financially and in terms of effective law enforcement; but these very burdens are indispensable elements of our constitutional framework. Surely the First Amendment rights of the average

citizen, through his civic and political groups, are entitled to equal stature.

This Court is here confronted with the dichotomy between the postal power granted Congress under Article I, Section 8, Clause 7, and the subsequent ratification of the First Amendment. However, evolving judicial history in the ensuing years confirms the paramount status of the First Amendment as indispensable to civilized society, and clearly elevates its significance beyond the simple power of Congress "To establish Post Offices and Post Roads". Mr. Justice Field in the watershed constitutional-postal power decision of Ex Parte Jackson, 96 U.S. 727, 732 (1877), held that postal regulations must be enforced "consistently with the rights reserved to the people, of far greater importance than the transportation of mail". Mr. Justice Brandeis, dissenting in Milwaukee Pub. Co. v. Burleson, 255 U.S.

407, 430-431 (1921), noted that the power of the post may be exercised only in a manner not infringing upon the Bill of Rights First Amendment protections. See also, Justice Holmes' dissent in Leach v. Carlile, 258 U.S. 138, 141 (1922). Particularly in the realm of criminal sanctions, as exists here, must the postal power inexorably give ground to the overriding public policy of the First Amendment. See Hiett v. United States, 415 F. 2d 664, 667, 668, 670 (5th Cir., 1969), cert. den. 397 U.S. 936 (1970). The United States Postal Service, in its frustrated and understandable zeal to promote economy and efficiency and escape from its horse and buggy image, has somehow lost sight of the fact that the citizenry has very definite First Amendment rights to which its operations must be subordinate. Esquire, Inc. v. Walker, 151 F. 2d 49 (D.C. Cir., 1945), affd. sub nom, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

The provisions of 18 U.S.C. Section 1725, through the regulatory vehicle of 39 C.F.R. Section 146.2, are applied to restrict non-commercial distributions of non-partisan civic groups seeking to further the public interest, against quasi-municipal bodies seeking to educate their constituents on public issues, and presumably against candidates for public office at the national, state and local level, all seeking to espouse certain causes or disseminate essential information to the community. As with 18 U.S.C. Section 1725, the regulation must be strictly construed and not extended beyond its clear terms. McCrossen v. United States, 339 F. 2d 810 (10th Cir., 1965).

While an act authorizing the imposition of criminal sanctions for alleged postal violations in the free speech-free press realm is to be strictly construed, conversely the mandate of

history and constitutional evolution requires that laws touching upon First Amendment rights must be narrowly drawn to pass constitutional muster. Schneider v. Smith, 390 U.S. 17, 24 (1968). While the criminal statute here might be narrowly drawn, as perhaps legitimately to restrict distribution of a specified class of commercial notices, the application thereof by the Postal Service transforms the legislative enactment into a broad limitation and prior restraint on the only practical means available to a broad segment of the citizenry in exercising their First Amendment rights. The comments of amicus National Association of Letter Carriers that there is only an "incidental infringement" of respondents' First Amendment rights or that of the Postal Service that there is but a "negligible" effect, is refuted by the record, as well as the reality of civic life.

The judicial branch is often required in the constitutional area to ascertain a balance between the legitimate ends of government on one hand and the interdependent need to protect and preserve the practical everyday mechanisms essential to the maintenance of our constitutional heritage on the other. The process becomes particularly delicate where a statute is judged not only in light of the First Amendment, but rises to the level of one specifically sanctioned under the Constitutional provision granting a specific postal power to the Congress. However, this balancing process must be implemented in light of the established principle that the postal power is inherently subordinate to the First Amendment. Societies may exist and even prosper without mandating a public monopoly over communications media, but none can be found in the annals of history in which free people long subsisted without

the effective, practical means to exercise the rights of freedom of speech, press and assembly. The Postal Service errs grievously in failing to recognize the priority which precedent, history, and experience mandate be afforded the First Amendment, as opposed to the limited governmental, proprietary interest in the area of postal regulation and marginal impact, if any, on the postal revenue.

While government arguably may impose some reasonable restriction on First Amendment expression, the balancing process requires a determination whether the governmental ends sought to be attained by the statutory enactment are of such significance and necessity as to justify any reasonable and limited First Amendment restriction, and whether such restraint is essential to avert any clear and present danger. United States v. Baranski, 484 F. 2d 556, 569 (7th Cir., 1973). A postal

deficit, here sought to be minutely diminished by suppressing respondents' civic speech, does not toll the death knell of freedom; its in terrorem impact on respondents clearly has already brought about such a result. The issues raised upon the present appeal do not relate merely to the survival of the respondents as viable citizen organizations; upon the decision to be rendered herein will rest the fate of civic organizations throughout the United States.

Whereas the First Amendment certainly requires no rationale here, the so-called Postal Power and the ends here sought to be achieved by the government's application of the subject statute does require analysis. The Postal Service argues that the ends sought to be achieved by the criminal sanction of 18 U.S.C. Section 1725 are (1) to protect and increase the postal revenue, (2) to prevent theft of mail and act as some

nebulous psychological benefit to its overall mail fraud detection program, and (3) to protect the individual resident citizen from having his mail receptacle excessively filled with non-postpaid material. The need to protect the postal revenue base is understandable. It is to be hoped that the need to operate government with some regard for financial considerations will never constitute a basis for overriding rights afforded by the First Amendment. While such revenue considerations may be afforded justifiable importance in commercial areas, governmental fiscal needs can not justify the practical emasculation of non-commercial First Amendment rights to all but the most affluent few who may be able to meet rapidly escalating postal rates.* The Postal Service's argument is patently

*See first footnote, p. 21

frivolous when the undisputed facts herein confirm that the respondents — and presumably all others similarly situated - would have but one alternative in the face of the continued Postal Service enforcement and present application of 18 U.S.C. Section 1725, namely to cease distribution. Thus, there would be no increase in the postal revenue, but solely the prior restraint of First Amendment rights, as the record confirms has already been inflicted on the Saw Mill Valley Civic Association (J.A.94, 98, 101).

As for the elimination of postal theft - a worthy objective - it is hard to conceive that a potential mail thief surreptitiously intruding into a residential mailbox receptacle would be measurably deterred by the knowledge that he faces a fine of $300 if he should happen to deposit non-postpaid mailable matter - as

opposed to non-mailable matter into the receptacle. Theft of mail is a felony punishable under 18 U.S.C. Section 1708, which refers to theft from any "letter box", presumably the same "letter box" encompassed by 18 U.S.C. Section 1725. 18 U.S.C. Section 1708, therefore, clearly fulfills the Congressional intendment in curtailing mail theft.

This Court, speaking through Mr. Justice Black, over thirty-six years ago, considered virtually the same arguments here made by the Postal Service; and in Martin v. Struthers, 319 U.S. 141, 143-147 (1943), repudiated a view which is tolerated only in a society which places more emphasis and value on the mentality of the police state than upon our constitutional heritage, firmly grounded in the Bill of Rights:

> ...burglars frequently pose as canvassers, either in order that they may have a pretense

to discover whether a house is empty and hence ripe for burglary... Crime prevention may thus be the purpose of regulatory ordinances.

* * *

While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. ..."Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." (emphasis supplied)

* * *

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society ... The dangers of distribution can so easily be controlled by traditional legal methods, ... that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas. 341 U.S. 144-147 (emphasis supplied)

The zealous law enforcers' pervasive suspicions so clearly condemned by this Court in Martin v. Struthers, supra, are precisely those which the Postal Service argued at trial as the rationale for the severity of its enforcement of 18 U.S.C. Section 1725 against civic free mailbox speech. (J.A. 118-121, 156-158). While security of the mail is an appropriate objective, under the facts here it does not constitute a permissible constitutional consideration, particularly since the Postal Service could produce no evidence of any civic involvement in crimes concerning the mails. In any event, the fact that there may be a potential mail thief in the great mass of the citizenry seeking to enter the marketplace of ideas does not warrant a general prior restraint on First Amendment rights. Fortunately, such a police state mentality does not constitute the touchstone of our society. This argument

was long ago repudiated by this Court; it should not now be revived.

The Postal Service's argument regarding the possibility of overstuffed mailboxes falls of its own weight. The record confirms that civic pamphleteering produces no such result. The Postal Service assumes that the great mass of "junk mail"* which inundates each residential mailbox is entitled to greater protection than the non-partisan civic or political distribution, solely because the commercial circular has paid the postal freight and the civic conscience can pay none. This rationale was effectively repudiated by the Court of Appeals at 586 F. 2d 938, i.e., questioning how the deposit of a postage-paid circular could be any less cluttering or endangering to a letterbox than an unstamped civic flier. It is to be hoped

*See Rowan v. Post Office Dept., 397 U.S. 728, at 736 (1970).

that the First Amendment cannot be said to rest upon such flimsy grounds. See, Thomas v. Collins, 323 U.S. 516, 510 (1945):

> ... These rights rest on firmer foundation . . . It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.

The First Amendment has been the subject of much history and jurisprudence and its standing is secure. The constitutional basis of the Postal Power is sparse indeed, which fact alone affords logical grounds to minimize its significance. Madison, in Federalist No. 42, opined:

> The power of establishing post-roads must, in every view, be a harmless power . . . (emphasis supplied)

Obviously a "harmless power" may not override or repeal the First Amendment.

Mr. Justice Holmes eloquently stated in dissent in Abrams v. United States, 250 U.S. 616, at p. 630-631 (1919):

> Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech."

Clearly the objectives here sought by the Postal Service do not approach such lofty levels. Tocqueville refers to "The post, that great instrument of intercourse". Tocqueville, Vol. I, Democracy in America, p. 404 (Alfred A. Knopf 1945). Steamboats, railroads and now airplanes have become great instruments of commercial intercourse, all without warranting any mass infringement on our basic constitutional rights. The Postal Service would seek to engraft upon Justice

Holmes' philosophy a special exception for its convenience, an exception which would place meaningful civic discourse beyond reach of most representative citizens. The First Amendment would be subject to the prior restraint of a financial means test; it would be rendered suitable, not for a democratic republic, but only for an oligarchy of the rich and politically powerful. Judge Learned Hand, commemorating fifty years of judicial service, stated:

> If we are to keep our democracy there must be one commandment: Thou shalt not ration justice. 264 F. 2d 35 (1959)

The Postal Service would do much more; it would meter out constitutional justice solely to the plutocratic few.

This Court has placed the Postal Service in proper perspective relative to our basic constitutional rights. Public

Clearing House v. Coyne, 194 U.S. 497, at p. 506 (1904):

> The postal service is by no means an indispensable adjunct to a civil government.
>
> * * *
>
> It is not . . . a necessary part of the civil government in the same sense in which the protection of life, liberty and property..... (emphasis added)

Respondents do not make distribution of newspapers in the modern commercial meaning of the term. However, the materials distributed fall within the purview of the free press protections. Lovell v. City of Griffin, 303 U.S. 444 (1938), Hughes, C. J., at p. 452:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a

vehicle of information and opinion.

Respondents exercise their First Amendment rights in homely style, unlike the prestigious daily newspapers or great publishing houses of our metropolitan cities. The First Amendment was intended by the Founding Fathers to be available to all, not merely to those who can bear great financial burdens and project their press product in an imposing cover.

The materials here sought to be distributed are admittedly non-commercial in nature. Whatever the constitutional justification for limitations on commercial distributions, it appears that charitable, civic, non-profit distributions or expressions of political persuasion are "an essential right that cannot be banned except for especially good reason," urgent governmental need or clear and present danger, none of which are here present.

Ad-Express, Inc. v. Kirvin, 516 F. 2d 195, 197-198 (2d Cir., 1975); Wolin v. Port of New York Authority, 392 F. 2d 83, 92 (2d Cir., 1968). The governmental need here espoused by appellant is of such relatively limited importance as wholly to fail to rise to the dignity of a statute which might justify even the slightest restriction on free speech or free press.

POINT II

THERE INHERES WITHIN THE FOUR CORNERS OF THE FIRST AMENDMENT A MEANS OF PRACTICAL IMPLEMENTATION

The respondents have proven that no other practical effective alternative to non-postpaid mailbox deposit exists; the Postal Service has sought to show that theoretical alternatives might conceivably be available. But the evidence does not in fact demonstrate the presence of any meaningful reasonable alternatives. One may not be deprived of the method which decades of diverse, practical, first-hand personal

knowledge of experienced civic organization representatives confirm to be the most efficacious method of exercising civic free speech. The Postal Service rationalization that such rights may be exercised elsewhere, or in a manner other than the procedure here sought by respondents, does not justify, nor avoid the subtle but real unconstitutional restrictions inherent in 18 U.S.C. Section 1725. Nor is the Postal Service qualified to judge or control when or where respondents may be permitted to raise their civic voices shielded by the First Amendment, under the guise of metering or muting their messages to inform and alert the citizenry. In Thornhill v. Alabama, 310 U.S. 88 (1940), Mr. Justice Murphy stated:

> ... one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. 310 U.S., at 106

The perspective of the practical constitutional deficiencies created here by the Postal Service requires consideration of the purpose and scope of the civic or political activity here under scrutiny. It is axiomatic that citizens have a responsibility to inform themselves on the workings of their governmental machinery and to participate therein to the greatest extent possible. To this end there exists the essential prerequisite of the dissemination of information, without which such efforts would be futile. Tocqueville has commented at length upon the tendency of our citizens to combine in order to exert sufficient united power, so as to further their mutual interests and protect themselves against the incipient tyranny of a government which becomes isolated from the ideas of the populace and whose administrative torpor is exacerbated by lack of access to citizen ideas.

Tocqueville, Vol. II, Democracy in America, Chaps. V, VI, VII, ibid. See also, Brandeis, J. in Whitney v. California, 274 U.S. 357, 375 (1927):

> the greatest menace to freedom is an inert people; that public discussion is a political duty

In Bates v. City of Little Rock, 361 U.S. 516, 522-523 (1960), this Court held that the essence of the first freedoms "lie at the foundation of a government based upon the consent of an "informed citizenry" (emphasis supplied). Respondents seek but to foster the presence of such an "informed citizenry".

Article IV, Section 4 of the Constitution, guaranteeing a Republican Form of Government, has been construed as being political and not within the scope of judicial scrutiny. It must remain for the citizenry, by their own resources, to sustain this guaranty. Chief Justice Waite,

in United States v. Cruikshank, 92 U.S. 542, 552 (1875) inextricably interrelated the First Amendment freedoms with this concept:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

For people to meet peaceably to petition within the law, to constitute an "informed citizenry," the method utilized by respondents, and virtually all civic and political groups throughout this republic, must be sustained. The right of peaceable assembly and to petition are cognate to those of free speech and press and are equally fundamental. DeJonge v. Oregon, 299 U.S. 353, 364 (1936), Hughes, C.J. It is not mere convenience of drafting that such rights were coupled in a single guaranty. Thomas v. Collins 323 U.S. 516, 530 (1945).

Respondents seek only viable methods of putting the First Amendment into actual practice. This Court in its decision making process, more than any other deliberative body, has recognized the reality of society. See Grayned v. City of Rockford, 408 U.S. 104, 118 (1971). Mr. Justice Holmes' celebrated comment regarding the competition of the marketplace for ideas has been characterized as being the "only practical test" The First Freedom, p. 456 (American Library Association 1960).

Mr. Justice Roberts stated in Schneider v. State, 308 U.S. 147, 161, 164 (1939), that the most effective way to disseminate opinion by pamphleteering is by "bringing them to the notice of individuals . . . at the homes of the people", a First Amendment method which may not be restricted in the name of public convenience or because there may often be present "fraudulent appeals in the name of charity and

religion," a view later articulated by Chief Justice Stone in his unpublished dissent in Martin v. Struthers, 319 U.S. 141 (1943)* and by Justice Black in his opinion for the Court. The Postal Service may seek the enactment of other laws, designed to obviate any real or imagined interference with the mails, with enforcement of the mail fraud statutes, or nominal interference, if any, with citizen privacy. Cf. Schneider v. State, ibid at p. 164.

The mass media are generally unavailable to the citizenry as a means of petition for redress of grievances - being relegated to the "poor man's newspaper", i.e. the type of civic fliers before this Court - so that effective access to a forum, namely a residential mail receptacle, assures that "some semblance of a market place of ideas can in practice be realized"

* Mason, The Supreme Court: from Taft to Burger, p. 155 (Louisiana State Univ. Press 3rd ed. 1979).

(emphasis supplied). Emerson, The System of Freedom of Expression, p. 286 (Random House 1970); Emerson, The Rights of Americans, p. 212 (Random House ed. Dorsen 1970).

Chief Justice Hughes emphasized the practicalities inherent in First Amendment exercise in Lovell v. Griffin, supra, 303 U.S. at p. 452:

> Liberty of circulating is as essential to that freedom as liberty of publishing, indeed, without the circulation, the publication would be of little value.

See also Lamont v. Postmaster, 381 U.S. 301, 305-306 (1965), where Mr. Justice Brennan, concurring, noted that the Bill of Rights encompasses also those guarantees "necessary to make the express guarantees fully meaningful," 381 U.S. at 308. The method adopted by civic groups for distribution of civic and political materials represents the only "meaningful" way in which to effectively utilize First

Amendment guarantees.

The record clearly reflects that respondents have no "ample alternative channels for communication", a criterion of obvious Constitutional import, Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977), where this Court noted the basic defect in an ordinance which restricted the free flow of information to the citizenry, a result similarly created by 18 U.S.C. Section 1725.

The Second Circuit, demonstrating the practical approach in balancing First Amendment claims in Wolin v. Port of New York Authority, 392 F. 2d 83 (2d Cir. 1968), did not relegate the exercise of "The First Freedom" to some impractible, useless, shackled fashion. Wolin sought to utilize the Port Authority interior - as respondents here seek access in time-honored community-sanctioned fashion to privately-owned mail receptacles -

> . . . because this is the most effective -and perhaps the only effective - way to achieve our purpose. (emphasis supplied) 392 F. 2d at p. 86.

The Court of Appeals struck down the Authority's regulatory ban, notwithstanding the possibility of disorderly public conduct, as to which no reasonable analogy of possible anti-societal impact exists with respect to the behaviour encompassed by 18 U.S.C. Section 1725. The anachronistic view that an "appropriate" facility should be restricted as a vehicle of free expression because it is "not traditionally a place for the exercise of First Amendment rights" (392 F. 2d at p. 89) - a view espoused by the Postal Service in regard to private mailbox receptacles - was rejected:

> . . . because they evidence too little regard for the vagaries of effective communication and for the versatility of the First Amendment's proscription. 392 F. 2d at p. 89.

Finally, the Court of Appeals repudiated the argument utilized by the Postal Service, that if any alternative means exist to exercise First Amendment rights, however inadequate, impractical or ineffectual they may be, then respondents must be bereft of any remedies, holding:

> Similarly, the availability of some alternative forum . . . are not material where the issue involves a blanket and wholesale ban. 392 F. 2d at pp. 91-92.

The First Amendment affords no protection if qualified by acts of Congress to the effect that the citizenry may exercise its rights of free speech, free press, or peaceably to assemble, only when, where and how the Postal Service directs. Certainly such was not the intendment of the Founding Fathers in adopting the First Amendment. The Constitution, in a clear recognition of contemporaneous English history, stated that "Congress shall make no

law . . ." It does not say that "Congress shall make no law except . . ." as may be necessary to operate an efficient or profitable postal system, or as will permit the exercise of the First Amendment Rights only in specific areas where Congress may sanction, or that a de facto financial means test may be a prerequisite to the effective exercise of such rights. The entire philosophical structure of the Postal Service's argument is at variance with our basic constitutional history.

As is clearly the inexorable, realistic and unrefuted impact occasioned by the appellant's enforcement of 18 U.S.C. Section 1725, the record confirms that the functional activities of civic or political bodies of a non-profit or non-commercial nature would be effectively stilled by the enforcement of the statute. The record confirms that the realities of community life, the apathy that regrettably pervades

our society, and numerous practical considerations fully support the result in the Court below. Respondents assert that such a postal tax inhibits the citizenry in the exercise of rights of free speech and free press, in the manner John Milton, in his Areopagitica, eloquently asserted that Parliament's ordinance of 1643 licensing the press served practically to emasculate a free press. It was obviously with this restrictive mother-country history so recently in mind that James Madison was motivated so purposefully in striving for the enactment of the First Amendment in the absolutist language in which it was first conceived and has so long endured.

Finally, the record irrefutably confirms that the Postal Service's threatened enforcement of 18 U.S.C. Section 1725 has in fact irrevocably impaired one respondent's ability to exercise its rights of free speech and free press. The Court is

urged to consider the practical realities in adjudicating the present constitutional challenge. This Court has noted that, in so doing, it may not "disregard the practical realities". Healy v. James, 408 U.S. 169, 183 (1972). It has long been evident that the flexibility and practical efficacy of the protections afforded by the Bill of Rights, and its ability to adapt to the realities and complexities of modern day society as a living and growing instrument, is based upon the recognition that our Constitution deals with substance rather than shadows, placing realities above theoretical philosophies.

POINT III

RIGHTS OF PEACEABLE ASSEMBLY, POLITICAL EXPRESSION AND FREE ASSOCIATION ARE INFRINGED BY 18 U.S.C. SECTION 1725

While the right of free association is not specifically covered by First Amendment

language, it is submitted that it is encompassed therein by clear implication and practical necessity. First Amendment guarantees necessarily carry with them by implication their practical means of utilization: Freedom to publish encompasses the right to receive, to read and to react by participating in the governance of a free republic. Similarly, the right to free association is a necessary corollary to the exercise of the explicit First Amendment right to "peaceably assemble, and petition the Government for a redress of grievances." Respondents submit that such right of association - essential to our society's liberties according to Tocqueville - is within the purview of the First Amendment; and that denied the right to distribute in the manner here at issue, the right is a mere illusion. See Eberhart v. Massell, 311 F. Supp. 654, at p. 658 (N.D. Ga.

1970):

> The freedom of association which the Supreme Court has recognized as protected by the First Amendment is a right to freedom of expression through associational affiliations.

The inevitable result of the Postal Service's enforcement of 18 U.S.C. Section 1725 would be the functional emasculation of the rights of free association and political expression. See also, Thomas v. Collins, 323 U.S. 516, 530 (1945):

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights. (emphasis supplied)

The First Amendment thus may certainly be construed as protecting the right of individuals to combine and for the association to engage in First Amendment advocacy on behalf of its members. Hanover

Township Federation of Teachers v. Hanover Community School Corp., 457 F. 2d 456, 459 (7th Cir., 1972).

The record reflects that candidates for public office are, as a practical matter, required to espouse their political beliefs in the same manner of delivery sought by respondents. Particularly is this the case with those who seek to unseat an incumbent vested with the very real economic benefits made available to public office holders. Nothing is more essential to a democratic society than to permit candidates for public office, whether rich or poor, to have available the means to run for office, which mandates practical access to resources essential for meaningful free speech. If deprived of the reasonable tools to run for public office, the right of free association and the effective expression of ideas is totally repudiated. See Mancuso v. Taft, 476 F. 2d 187, 196 (1st Cir., 1973).

The statute here under attack does not impose reasonable limitations; it absolutely denies, de facto, the effective right of free expression and association to all but the affluent few. "Wealth . . . is not germane to one's ability to participate intelligently in the electoral process". Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1965). This Court has clearly articulated our

> . . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1963).

This right is not reserved for those commanding the wealth or power of the New York Times; it must extend "to the poorly financed causes of little people" alluded to by Justice Black in Martin v. Struthers, supra, 319 U.S. at 146, i.e., the respondents here and all such civic or political groups or individuals. See

Chafee, Free Speech in the United States, p. 31 (Cambridge Press, 1941). Professor Chafee has put in very real terms the critical interdependence of free speech, assembly and political expression,

> Under modern conditions, freedom of speech under the First Amendment is likely to be ineffective if it means only the liberty of an isolated individual to talk about his ideas. Indeed, from the very beginning, freedom of speech has involved the liberty of a number of individuals to associate themselves for the advocacy of a common purpose whether they exchange ideas in a hall or by mail like the Committees of Correspondence before the Revolution. Chafee, The Blessings of Liberty, p. 150-151 (Phila. 1956)

It seems evident that the cognate right of assembly, and by implication association, are indispensable elements to effective expression in our pluralistic society, that such rights are essential to social stability and the functioning of our democratic society. See, Emerson, 72 Yale L.J. 877, 934, 954 (1963). The erudite

comments of Professor Archibald Cox at 94 Harv. L.R. 1, 3 (1980) regarding the dependency of effective self-government upon "the free flow of information" sought by respondents are particularly apposite here, citing this Court's opinions in Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964), and Cohen v. California, 403 U.S. 15, 24 (1971).

Tocqueville wrote in 1840: "In no country in the world has the principle of association been more successfully used or applied . . . than in America." ibid, p. 191. As we passed from the town meeting society of the 18th century to the industrialization of the 19th and to the megalopolis of the present century, this accelerating tendency has led the citizenry to seek common ways effectively to solve and participate in the political process.

History teaches us that one of the chief purposes of the First Amendment was to

foster open discourse on governmental functions. This necessarily encompasses debates on candidates, the manner in which government is or should be managed, and all matters incident to the political process. Mills v. Alabama, 384 U.S. 214, 218-219 (1966). In Kusper v. Pontikes, 414 U.S. 51, 56, 57 (1973), this Court enunciated the crucial role which group political association fulfills in our constitutional framework.

The obvious requirement of candidates' need for direct home personal contact and distribution of literature in the only effective way available - mailbox volunteer non-postpaid delivery - cannot be overstated. This Court further commented in American Party of Texas v. White, 415 U.S. 767, at p. 787 (1974):

> Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization.

Particularly is this the case for the local candidate, the independent insurgent seeking to unseat a vested incumbent political power, and the candidate with limited financial resources. Without access to such procedure, our political system may simply wither due to lack of access to new ideas or fresh persons flush with new enthusiasm for the never ending task of revitalizing government and maintaining the democratic system.

Secondly, the political process can survive only upon the continued free flow of information, a flow based upon the implied or cognate First Amendment right to receive, a constitutional right recognized by this Court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969):

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

This constitutional right to information appears to have formed the touchstone for this Court's decision in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), and the line of cases cited therein. See also Martin v. Struthers, supra, at 319 U.S. 146, and the concurrence of Mr. Justice Brennan in Lamont v. Postmaster, 381 U.S. 301, 308 (1965):

> It is true that the First Amendment contains no specific guarantee of access to publications. . . . the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers. (citations omitted).

In commenting upon the problems of fostering effective free expression, Professor Emeritus Thomas I. Emerson of Yale Law School stated:

> Search for the truth is handicapped because much of the argument is never heard or

> heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens, and feedback to the government is feeble. Emerson, The System of Freedom of Expression, pp. 628-629 (Random House 1970).

If the First Amendment does not mean at least this, it will ultimately be of little relevant practical value for most citizens. It must never be forgotten that "the greatest menace to freedom is an inert people". Whitney v. California, supra, 274 U.S. at p. 375. Such inertia will inevitably be nurtured by the appellant's argument, which idolatrizes conformity and governmental expedience at the cost of conscience and knowledge.

The majority of First Amendment cases coming before this Court in recent years presenting, as here, claims of broad statutory speechrestriction, i.e., overbreadth, turnupon the impact of "content-neutral" legislation. Indeed this Court's great First Amendment

pronouncements have rested upon its unique ability to pierce the "content-neutral" outer shell and analyze the real life impact of such restrictions on First Amendment freedoms. The Postal Service would have this Court repudiate such an approach, one which seeks to render the simple, eloquent mandate of the First Amendment meaningful, practical and real for the average citizen. See the dissent of Justice Black in Feldman v. United States, 322 U.S. 487, 501 (1944):

> The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential ... The proponents of the First Amendment, ... were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge. (emphasis supplied)

See also, United States v. Baranski, 484 F.

2d 556, 565 (7th Cir., 1973).

The Postal Service bases its entire argument upon the view that the statute is "content-neutral" and, therefore, infringes no Constitutional rights. It argues that it has but a "negligible effect on the exercise of First Amendment rights," and that the real life considerations and long established customs of the community, which effectively preclude alternative means, are but "trivial considerations". Finally, the Postal Service argues that a financial means test should be engrafted to the First Amendment, i.e., only citizens who can afford the tariff may utilize the residential mail receptacle. See Troyer v. Town of Babylon, 483 F. Supp, 1135 (E.D.N.Y 1980), affd. sub nom. Town of Southampton v. Troyer, 628F. 2d 1346 (2d Cir. 1980), affd. - U.S. - (Dock. No. 80-333, November 17, 1980), where Judge Weinstein stated at 483 F. Supp. 1139:

> Perhaps a group might by a comprehensive telephone campaign arrange for permission before visiting particular homes, but the financial and logistical burdens would inhibit newly organized or minor cults and creeds. Requiring consent of householders before approaching their homes constitutes, in effect, an indirect unconstitutional imposition of a licensing fee; it generates costs which burden the exercise of first amendment rights ... (citations omitted)

One need only examine the "content-neutral" prohibition of "For Sale" signs in Linmark Associated, Inc. v. Willingboro, supra, to perceive the superficial nature of the Service's argument. The uncontested record here confirms the de facto prohibition on effective speech, publication and ability peaceably to assemble. Saw Mill Valley died an in terrorem civic death due to its inability to communicate by reason of threatened enforcement of 18 U.S.C. Section 1725, which the Service summarily dismisses in

its brief as "a negligible effect" on First Amendment rights.

This Court's analysis in Linmark succinctly enunciates respondent's position and reflects that of the Postal Service.

> First, serious questions exist as to whether the ordinance "leave(s) open ample alternative channels for communication, . . ." Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated - primarily newspaper advertising and listing with real estate agents -involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message ... 431 U.S. 85, 93 (1977)

The Postal Service argues -in the face of the uncontroverted record below - that theoretical alternatives do exist. This respondents do not deny; if a group is politically powerful, economically

affluent, possessed of unlimited time without burdens of employment, demands of home, etc., there may well be alternatives for a favored few. This argument ignores the nature of society and the linchpin of the First Amendment. Rowan v. Post Office Dept., 397 U.S. 728, 735 (1970), where the Chief Justice noted that homeowners may take affirmative action to preclude distribution, a traditional law device which respondents believe protects both their First Amendment rights of distribution and rights of individual privacy.

Mr. Justice Sutherland's eloquent opinion in Grosjean v. American Press Co., 297 U.S. 233, 247 (1936), in recounting the English struggle to prevent the imposition of "taxes on knowledge," succinctly states the essence of that struggle, which is here in a modest but significant way being continued by the representative

respondents:

> The aim of the struggle was ...to establish and preserve the right of the ...people to full information in respect of the doings or misdoings of their government.

The respondents, by means of the civil and political combinations referred to by Tocqueville, here seek to utilize these great First Amendment protections ~~to~~ further free and open discussion of their community life and of governmental management or mis-management of the people's vital business. See Mills v. Alabama, 384 U.S. 214, 218, 219 (1966), where Mr. Justice Black stated:

> ...a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes ...humble leaflets and circulars.

The Postal Service argues that its statute is reasonable in objective and does not interfere with constitutional rights. It is submitted that the indisputable prior restraint here imposed, although subtle and not appearing in the four corners of the statute, is a very real practical inhibition. See P.A.M. News Corp. v. Butz, 514 F. 2d 272, 276-277 (D.C. Cir., 1975):

> Among the "evils to be prevented" by the first amendment press guarantee are ...any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

The principles in Griswold v. Connecticut, 381 U.S. 479 (1965), are an appropriate summary of the respondents' arguments. Justice Douglas noted that the First Amendment has a broad penumbra which sweeps within its ambit certain basic

rights not explicitly stated, and thereby precludes the state from inhibiting the right to distribute, from fettering freedom of association and of speech, or hampering a free press. The right "peaceably to assemble" is for respondents so inextricably bound up with free speech and free press that an infringement of one inherently infringes the other indivisible, inalienable cognate rights. The Court further noted that it has

> protected forms of "association" that are not political in the customary sense but pertain to the social, legal and economic benefit of its members. 381 U.S. 483

Respondents here seek no more, all for the benefit of the citizenry they represent in the civic and governmental sphere. Only by striking down the subject statute, and its regulatory companion,* can such rights be preserved, and effectively utilized.

*39 C.F.R. Section 146.2

"The life of the law has not been logic; it has been experience". Holmes, The Common Law, p. 1 (1881). The centennial of this great work is an appropriate time to recognize that Professor Holmes was there simply articulating for the profession that the law has grown in such a way as to enable it flexibly to adjust to the realities, and not be shackled by phrases which have no contemporary efficacy. The First Amendment has survived as a practical living force in our society by reason of its ability to evolve and confront changing conditions; not just immutably reflect the dry bones of language rooted forever in an 18th century context. Levy, Freedom of Speech and Press in Early American History, p. 309 (Harper & Row 1963 Torchbook ed.) Perhaps in times when town meetings were the order of the day, the needs here asserted by respondents would not have been so indispensable to the exercise of basic First Amendment rights.

The overwhelming monopoly of the mass media, the urbanization of our society, the depletion of environments conducive to effective political debates have all tended to diminish the influence of the individual and his ability to join with his neighbors in order to exercise an effective voice in the conduct of government.

Contrary to appellant's footnote implication at page 6 of its brief, the record here is uncontroverted that by practice and long established tradition people welcome and affirmatively rely upon such flow of civic information.* That the statute - enacted to encompass commercial distributions, - has stood as a civic nullity for forty-six years is no reason to raise it in stature above meaningful free speech considerations, on the "presumptively valid Act of Congress" theory embraced by the Postal Service to

*See Appendix 1a

dilute the First Amendment.

Respondents do not denigrate the appellant's well-intentioned motives in terms of mail delivery. The Postal Service may achieve its desired objectives by statutory restrictions which do not absolutely, as here, repress civic speech. Indeed other statutory devices are readily available, see Martin v. Struthers, at 319 U.S. 147, and Troyer v. Babylon, supra, 483 F. Supp. 1138. The Postal Service's position is essentially one of inconvenient hindrance (J.A. 161). Apparently, the Service believes the statute to be of more significance in low income urban areas (J.A. 119), certainly not a rational basis to sustain its constitutionality. The present appeal involves not a clash of wrongs, but rather relative priorities between significantly different constitutional rights. As cited in Point I, the postal power is inherently inferior to

the Bill of Rights' First Amendment protections.

However, in considering First Amendment issues, the judicial branch should not disregard the practical realities embodied in "the life of the law" as "experience", articulated by Mr. Justice Holmes a century ago. Respondents believe that the now widely accepted language of Justices Holmes and Brandeis in Whitney v. California, 274 U.S. 357, at 375, 377 (1927), articulates the evolving, flexible Constitutional jurisprudence upon which respondents base their rights at bar. The ministerial Postal Power has, therefore, but a very narrow scope for being sustained over First Amendment rights, to be weighed lightly, if at all, in terms of the balance scale of Constitutional jurisprudence. To come within this limited area, the governmental need sought to be achieved by the legislation must be one of

paramount urgency or emergency, or posing a clear and present danger to the Nation's survival, a state of affairs which is certainly not here present. Thomas v. Collins, 323 U.S. 516, 530 (1945). The argument, professing "valid governmental interests," cannot be deemed constitutionally sufficient to render the First Amendment a practical nullity for the average person without economic resources sufficient to purchase postal meter privileged protection for civic speech. The rationale of Mr. Justice Harlan in his concurring opinion in Talley v. California, 362 U.S. 60, 66-67 (1960), is particularly persuasive:

> Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity, and libel," in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will

> not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character.

Justice Harlan there noted the record's lack of any clear factual basis to support the government's argument of urgent necessity. The record here is similarly barren of any factual support to sustain 18 U.S.C. Section 1725.

A statute, as here, imposing criminal sanctions, with a clearly chilling, restrictive effect upon a broad spectrum of First Amendment rights, will be set aside on constitutional grounds as being void for vagueness unless (1) the conduct sought to be regulated is specifically and narrowly defined, and (2) the expression upon which it impacts is not within the explicit protection of the First Amendment, or its broad "penumbra". Hiett v. United States, 415 F. 2d 664 (5th Cir., 1969). The present

statute, as here applied, clearly fails these constitutional tests. The statute, albeit "content neutral" on its face, contravenes basic First Amendment rights. Murdock v. Pennyslvania, 319 U.S. 105, 115 (1943).

The present statute, all-encompassing in scope and not recognizing any reasonable permit procedures in order to allow essential First Amendment freedoms, must be held invalid on its face and in its entirety under the doctrine of "overbreadth". See United States v. Baranski, 484 F. 2d 556, 570 (7th Cir., 1973). "It is the broad sweep of the ordinance, and its chilling effect on a wide range of 'expressive or communicative conduct' which here reveals its facial invalidity". Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Respondents do not here contend that house-to-house mailbox deposit of civic material without postage is immune from all

legislative restriction. As suggested in Martin v. Struthers, 319 U.S. 141, 148, 151 (1943), Cantwell v. Connecticut, 310 U.S. 296, 306-307 (1940), and Schneider v. State, 308 U.S. 147, 165 (1939), reasonable limitations might be specified, and sanctions provided against disregard of house-holder notices forbidding deposits. See also, Rowan v. Post Office Dept., 397 U.S. 728, 736-737 (1970), and Troyer v. Town of Babylon, supra, 483 F. Supp. 1135, 1138-1139, affd. -- U.S. -- (Docket No. 80-333, November 17, 1980)

Moreover, the statute is admittedly penal in nature, notwithstanding the extra-legislative efforts of the Postal Service to convert it into a revenue regulation; hence any ambiguity should be resolved in favor of lenity, Rewis v. United States, 401 U.S. 808, 812 (1971). A penal statute shown to have material free press-speech restrictions is restricted by the rule that

a criminal statute is to be strictly construed, particularly when First Amendment rights are involved. Schwartz v. Romnes, 495 F. 2d 844, 849 (2d Cir., 1974); see also Ex Parte Endo, 323 U.S. 283, 300 (1944); and United States v. Wiltberger, 5 Wheat 76, 95 (1820), Marshall, C.J.

As citizen groups Respondents recognize the right of privacy, strangely here championed by the Postal Service.* The decision in Troyer v. Town of Babylon, supra, affirmed by this Court, succinctly presents the solution to this apparent conflict of values:

*The present case is not controlled by the captive audience doctrine of Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), which related to a management decision to preclude political advertising, as opposed to the present absolute statutory ban. In the instant case, homeowner recipients may read or discard the message as they see fit. Similarly the restrictions on rights of those incarcerated as in Jones v. North Carolina Prisoners Labor Unions, Inc., 433 U.S. 119 (1977), does not warrant such restriction on the citizenry in general.

> . . . extension of the freedoms of some often has a tendency to encroach upon those claimed by others. Nevertheless, the burdens placed on plaintiffs' free expression of ideas are not easily justified by balancing them against local interests in privacy and property.
>
> * * *
>
> ... in balancing societal and private interests in the free flow of ideas, the right of individual citizens to privacy and the ability of the state to exercise its police power, ... the individual desiring privacy must assume the burden of indicating the choice to be left alone.
>
> * * *
>
> ... the dangers of distribution may ... easily be controlled by traditional legal methods ... 483 F. Supp. 1137, 1138.

The Postal Service, in addition to asserting that civic groups might bear the burden of escalating postal rates or the astronomical costs of newspaper advertising, suggests the use of telephone communication. The record totally discredits this approach (J.A. 63), which method had proven to be "a disaster" (J.A.

343). See also Troyer v. Babylon, 483 F. Supp. at 1139. The Postal Service here relies on sheer labels -"content-neutral" - as a basis to constrict First Amendment rights on the basis of impracticable hypotheses. This Court has not permitted government to ". . . foreclose the exercise of constitutional rights by mere labels". NAACP v. Button, 371 U.S. 415, 429 (1963).

POINT IV

18 U.S.C. SECTION 1725 ENCOMPASSES ONLY COMMERCIAL DISTRIBUTIONS

The Postal Service relies upon the prior district court decision on the pleadings (448 F. Supp. 159) to argue that the statute was intended to encompass non-commercial distributions,*

The clear intent of Congress was to curtail the commercial practice by "Business Concerns ...of having

*reversed 586 F. 2d 935 (2d Cir. 1978)

their circulars, statements of account, etc., delivered by private messenger", 586 F. 2d at 938-939, fn. 5. The Postal Service relies for a contrary interpretation upon Congressional colloquy two years prior to enactment of 18 U.S.C. Section 1725. The legislative history confirms (a) Post Office doubt as to the legality of the legislation, (b) that people owned their own mailboxes and wished to receive non-postpaid matter, and (c) the legislation was directed exclusively at the contemporary practice of commercial utilities, which postal authorities feared would adversely affect mail revenues. (Appendix 1a). Utilities no longer employ this depression era hand deposit non-postpaid method (J.A. 33, 113; T.P. 346)

The explicit language of Section 1725 encompasses only commercial matter. Basic principles of statutory construction, noscitur a sociis and ejusdem generis

compel the same conclusion, Jarecki v. G. D. Searle Co., 367 U.S. 303, 307 (1961).

Prior unsuccessful attempts at legislation are clearly not the best guide to legislative intent, particularly absent proof that the prior legislative discussions were given any ultimate consideration. Zuber v. Allen, 396 U.S. 168, 193 (1969); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381-382, fn. 11 (1968). Moreover, legislative history should not be utilized to construe a statute contrary to its plain terms. See United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932).

The comments of Circuit Judge Friendly in Foti v. Immigration and Naturalization Service, 308 F. 2d 779, 786-787 (2d Cir. 1962) are particularly apt:

> ... a remark made in the course of debate, heard, in all probability, by only a few members of one house, two years before a bill's final passage,

should not overcome clear statutory language.

A statute must be construed in light of present society and not circumstances uncontemplated at the time of passage.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed and 18 U.S.C. Section 1725 be declared unconstitutional as to all non-profit, non-commercial communications, whether civic, political or of any public interest nature.

Respectfully submitted,

Jon H. Hammer
Attorney for Appellees

E. Payson Clark, Jr.
Of Counsel

April 1981

APPENDIX

Office of Postmaster General
Washington, D.C., March 4, 1932

Hon. James M. Mead,
Chairman, Committee on the Post Office
and Post Roads,
House of Representatives.

MY DEAR MR. CHAIRMAN: Receipt is acknowledged of your letter of February 15, 1932, requesting the department's views on bill H.R. 9262, to amend section 321, title 18 of the United States Code.

The purpose of this bill is to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes or other receptacles established for the receipt of delivery of mail without payment of postage thereon, by making this a criminal offense.

Much matter of this kind is of course now deposited in private mail boxes, thus depriving the Postal Service of considerable revenue which it would receive if the matter were sent through the mails.

While the department is in sympathy with the objects of the bill, since it would probably bring in additional revenue of more than $4,000,000 a year, it is necessary to call attention to the questionable legality of such a measure. The mail receptacles involved are private property and under the control of the owners, some of whom doubtless are willing to receive therein, without postage, matter of the character covered by the bill.

Very truly yours,

Walter F. Brown

(Letterhead)

August 20, 1979

Honorable Mary C. Daly
Assistant United States Attorney
United States Department of Justice
Southern District of New York
One St. Andrew's Place
New York, New York 10007

BY HAND

Re: Council of Greenburgh Civic Associations v. United States Postal Service
77 Civ. 483 (WCC)

Dear Ms. Daly:

As I advised you in some of our recent telephone conversations, it is apparent that there are numerous errors in the transcript of the trial proceedings of June 28, July 5 and July 6. Mr. Clark and I have reviewed the transcript in detail and there are errors which appear at pages 2, 3, 4, 6, 8, 11, 18, 20, 29, 32, 33, 45, 50, 55, 60, 61, 64, 91, 95, 98, 102, 103, 107, 148, 149, 152, 153, 154, 157, 158, 159, 162, 168, 169, 171, 173, 175, 183, 185, 188, 195, 196, 198, 202, 210, 213, 214, 217, 221, 226, 237, 278, 279, 285, 286, 305, 315, 317, 326, 337, 342, 345, 347, 356, 361, 372, 374, 377, 418, 429, 431, 440, 447, 478, 483, 484, 501, 523, 531, 537, 540, 546, 554, 557, 565, 575, 579, 580, 582, 586, 588, 589, 594, 595, 604, 617, 618, 619, 621, 623, 625, 630, 634 and 636.

I am delivering to you herewith a bound set of the corrected pages referred to above. I am also delivering a copy to the

court with the request that it be made a part of the record, as corrected, or that the corrected pages be inserted in the transcript.

Very truly yours,

Jon H. Hammer

JHH:mt
cc: Honorable William C. Conner
United States District Judge

E. Payson Clark, Jr., Esq.

(Letterhead)

September 14, 1979

Honorable Wiliam C. Conner
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: Council of Greenburgh
Civic Associations v.
United States Postal
Service
77 Civ. 483 WCC)

Dear Judge Conner:

I am herewith enclosing the original of the plaintiffs' post-trial memorandum of law. I have also included an appendix which contains certain items of statutory history, and, for the convenience of the Court, an index to plaintiffs' exhibits, submitted during the trial, and a copy of the stipulation of facts entered into by the parties during the course of the trial. For the convenience of the Court and the Court's law clerk, I am enclosing herewith an addtional copy of plaintiffs' post-trial memorandum of law. Further submitted herewith are all of the original exhibits submitted by the plaintiff and marked for identification and/or received in evidence, as itemized in appendix D to the post-trial memorandum of law.

With respect to the transcript of the trial proceedings, Assistant United States Attorney Daly has indicated to me by telephone that her preliminary review of the transcript confirmed that she was in

accord with plaintiffs' listing of errors which appear in the transcript, as detailed in my letter to Ms. Daly dated August 20, 1979, a copy of which was forwarded to the Court, together with a bound set of the corrected pages.

Respectfully,

Jon H. Hammer

JHH:mt
Encls.
BY HAND
cc: Honorable Mary C. Daly (BY HAND)

No. 80-608

APR 27 1981

ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE,
Appellant,

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS and SAW MILL VALLEY CIVIC ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION OF APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

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OCTOBER TERM, 1980

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UNITED STATES POSTAL SERVICE,
Appellant,

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS and SAW MILL VALLEY CIVIC ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION OF APPELLEES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Appellees move this Court, pursuant to Rule 35.6 of the Supreme Court Rules for leave to file the Supplemental Brief included herein after oral argument which was held on April 21, 1981.

This Supplemental Brief addresses only a statutory argument presented at oral argument but not previously briefed by the parties in their principal briefs filed in this appeal. The question of whether or not Section 1725 can properly be applied to distribution by "private hands

without compensation" was discussed in Appellant's Reply Brief, p. 4 n.2, in response to the argument of Amici Independent Sector et al.* Because this argument was the subject of considerable discussion at oral argument, Appellees request leave to submit the enclosed Supplemental Brief.**

Respectfully submitted,

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April 27, 1981

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* Appellees first obtained a copy of the Appellant's Reply Brief from the Supreme Court Clerk's office on the afternoon preceding the oral argument of this case.

** Appellees are authorized to represent that Amici Independent Sector et al. and Piedmont Heights Civic Club, Inc. et al. have reviewed and join the statutory argument contained in the enclosed brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-608

UNITED STATES POSTAL SERVICE,
Appellant,

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS and SAW MILL VALLEY CIVIC ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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APPELLEES' SUPPLEMENTAL BRIEF

Section 1725, Title 18, U.S.C., provides:

> Whoever knowingly and willfully deposits any mailable matter such as statement of accounts, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

Congress specifically limited the criminal conduct proscribed by this statute with the language "with intent to avoid payment of lawful postage thereon. . ." Neither Section 1725 nor any other provision of Chapter 83 of Title 18 defines the term "lawful postage." Nor does Title 39 of the United States Code, "Postal Service," de-

fine "lawful postage." Rather the meaning of that term must be derived from analysis of several statutory provisions.

Appellant is authorized by law to establish "equitable rates of postage and fees for postal services." 39 U.S.C. § 3621. Postage must be paid not only when a letter is sent through the mail, but generally must also be paid when a letter is carried "out of the mails." [1] However, Congress has specifically exempted altogether from the requirement to pay postage delivery of letters outside of the mails "by private hands without compensation." 18 U.S.C. § 1696(c).[2] Distribution of appellees' circulars and leaflets by uncompensated volunteers clearly constitutes "conveyance or transmission . . . by private hands without compensation," hence is squarely within the exemption Congress has created from payment of "lawful postage." [3]

Since appellees had no legal obligation to pay any postage on the matter distributed by the volunteers, as a matter of law they could have no "intent to avoid pay-

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[1] Section 601 of Title 39 provides that "[a] letter may be carried out of the mails when", *inter alia*,

> (2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope. . . .

[2] 18 U.S.C. § 1696(c) provides:

> (c) this chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messanger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 601 of title 39, shall be observed as to each piece.

[3] Section 1696(c) also exempts the delivery by special messenger employed for that particular occasion only, so long as such special messenger conveys no more than twenty-five letters or packets. If more than twenty-five letters are to be conveyed by special messenger, the sender has the obligation to pay postage required by 39 U.S.C. § 601(a)(2).

ment of lawful postage" within the meaning of 18 U.S.C. § 1725, in depositing such matter in residents' mailboxes. Accordingly, Section 1725 has no application whatever to appellees' distribution of leaflets to privately-owned mailboxes, and the sanctions imposed by that section are likewise inapplicable to appellees and other non-profit groups similarly situated.

It is also noted that Appellant, in its reply brief, characterizes its demand that all mailable matter deposited in a private mailbox be stamped as a "fee for use of the mails." (Reply Brief for Appellant at 4; footnote deleted.) No such user-fee can be justified here, where appellees use no services of the Postal Service whatever, and are specifically exempted by 18 U.S.C. § 1696(c), *supra*, from the requirement of paying postage.[4]

Respectfully submitted,

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[4] The private mailbox is the end of the mail distribution chain, and no action of the Postal Service is thereafter involved in putting the matter in the recipient's hands. The asserted expense incurred by the Postal Service when mail carriers sort through matter found in a mailbox is de minimus and speculative by any standard as the Court below found. 490 F. Supp. at 157.

No. 80-608

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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1. Appellees contend that they have a First Amendment right to place circulars and comparable items, free of charge, in letter boxes and other receptacles designated by the Postal Service for the receipt or delivery of the United States Mail. See Domestic Mail Manual (DMM) 151.1. This contention ignores the special and limited purposes for which these receptacles are used.

a. As we have explained in our opening brief (Gov't Br. 3 n.2), the DMM requires a postal customer to provide an appropriate receptacle for the receipt of mail as a condition to the Service's delivery of mail to the customer's address. Even though the letter box is furnished by the customer, it becomes a part of the system for the delivery of mail as a result of its acceptance by the Postal Service as an authorized receptacle. By virtue of that acceptance, for example, the sender and recipient both are afforded the significant

protection of federal statutes prohibiting the damaging or destruction of letter boxes and the theft, defacing, or destruction of mail deposited therein, 18 U.S.C. 1702, 1705 and 1708, just as federal statutes protect other property used in the delivery of mail and protect the mail itself at other stages of its transmittal. See, *e.g.*, 18 U.S.C. 1702 and 1707.

Postal Service regulations in the DMM provide that letter boxes and other receptacles designated for the delivery or receipt of mail "shall be used exclusively for matter which bears postage" (DMM 151.2).[1] This requirement that the receptacle the customer furnishes be used exclusively for mail-related purposes is a reasonable condition to the incorporation of that depository into the mail delivery system and the furnishing of federal protection to it. The statute involved in this case, 18 U.S.C. 1725, merely reinforces this protection for the integrity of the letter box by prohibiting, under pain of criminal sanctions, the deposit into the box of any mailable matter on which postage has not been paid.

b. The reasonableness of these restrictions is underscored by a consideration of the statutory scheme establishing the Postal Service's broad mandate. Under 39 U.S.C. 403(a), the Postal Service is to "plan, develop, promote, and provide adequate and efficient postal services at fair and

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[1]The provision in DMM 151.2 is comparable to a provision first included in *Instructions for the Guidance of Postmasters and Carriers in the Conduct of the Rural Delivery Service* promulgated by the Postmaster General in 1907. Section 120.2 of those *Instructions* provided that "mail boxes erected on rural routes are intended exclusively for the reception of mail matter regularly in the mails, and mailable matter deposited in rural mail boxes is subject to the rules regulating mail matter, including the payment of postage thereon at regular rates." A similar regulatory prohibition was made applicable to city and village routes in 1934. See Gov't. Br. App. 1a-2a. The statute at issue in this case, 18 U.S.C. 1725, was enacted against the background of these pre-existing regulatory prohibitions.

reasonable rates and fees." Section 403(b)(1) similarly directs the Postal Service "to maintain an efficient system of collection, sorting, and delivery of the mail nationwide." See also 39 U.S.C. 404(a)(1). Under these provisions, and quite aside from the specific congressional direction in 18 U.S.C. 1725, the Postal Service plainly was authorized to promote an "efficient system of collection, sorting, and delivery" by providing in regulations that a letter box designated for the delivery of mail may not be used for other purposes. As we explain in our opening brief (Gov't Br. 21 & n.14), for example, the customer may place in the letter box outgoing mail and money to be picked up by the letter carrier. The Postal Service reasonably could provide for efficient "sorting" of materials in a mailbox and "collection" of letters and money left there for the carrier by excluding other materials from the receptacle. See also Gov't Br. App. 2a. The congressional reports on 18 U.S.C. 1725 reveal a similar purpose of preventing "the stuffing of letter boxes with extraneous matter" (H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934)).

Limiting the use of letter boxes to matter that bears postage also furthers the congressional purpose of providing postal services "at fair and reasonable rates and fees" (39 U.S.C. 403(a)) by ensuring that those who seek to take advantage of the security and integrity of letter boxes share in the costs of operating the postal delivery system of which those boxes are a part. Cf. 39 U.S.C. 403(c). The congressional reports on 18 U.S.C. 1725 expressed a similar purpose, noting that many business concerns had adopted the practice of having their circulars delivered by private messenger to letter boxes erected for the receipt of mail and that "[t]his practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through

the mails" (H.R. Rep. No. 709, *supra*, at 1; S.Rep. No. 742, *supra*, at 1).

2. Despite these legitimate purposes that are furthered by 18 U.S.C. 1725, appellees contend that the statute may not be applied to them because to do so would infringe upon their First Amendment right to communicate with residents of their communities. Stripped to its essentials, however, appellees' claim is that the First Amendment affords them a right to use a portion of the postal delivery system without paying the established postage. This novel contention that the First Amendment bars the imposition of a reasonable, non-discriminatory fee[2] for the use of the mails and facilities related thereto is without merit. See, *e.g.*, *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 130-131 (1977); *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155 & n.16 (1946); *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting); *Ex parte Jackson*, 96 U.S. 727, 732 (1878).[3]

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[2]Amici Independent Sector and its member organizations err in contending (Br. 5-6) that express mail companies that are exempt from the ban against competing with the Postal Service (see, *e.g.*, 39 C.F.R. 320.6) are, for that reason, permitted to deposit their materials in designated letter boxes without the payment of postage. Although an exemption from the Private Express statutes excuses the payment of lawful postage for the *carriage* of letters outside of the mails, it does not excuse the payment of the required postage where the authorized private carrier uses a designated letter box to effectuate a *delivery*. See 45 Fed. Reg. 56055 (1980). Accordingly, contrary to amici's contention (Br. 6), a private carrier covered by the Private Express statutes would have the requisite "intent to avoid payment of lawful postage" under 18 U.S.C. 1725 if he deposited mailable matter in a letter box without affixing the required postage to it. Accordingly, no equal protection issue is presented.

[3]Appellees' reliance (Br. 52-53, 72-73) on these same decisions as support for their asserted right to use letter boxes free of charge is misplaced. The First Amendment issue discussed in these cases concerned the government's authority to bar matter from the mail, or

3. Appellees assert (Br. 25-29) that, in many situations, use of the mails is not a practical alternative to the deposit of circulars in letter boxes free of charge because appellees often must distribute their materials quickly and cannot risk a possible delay in mail delivery. The district court relied on the same factor in finding an absence of adequate alternatives for appellees. See J. S. App. 3a-4a, 10a. Appellees and the district court both misapprehend the nature of the prohibition in 18 U.S.C. 1725. That section does not provide that only Postal Service personnel may place mailable matter in an approved letter box or that an individual must utilize the mails in order for his letter to be deposited in such a box. Section 1725 prohibits only the deposit of mailable matter in a letter box without the appropriate postage. If appellees' members and supporters affix the proper postage to their circulars, they may personally deposit them in letter boxes with whatever dispatch they desire. Therefore, asserted delays or other difficulties in using the mails have no bearing on the validity of the statute. The only issue, then, is whether appellees have a right to use a part of the postal delivery system without paying the standard fee for doing so. Appellees have fallen far short of demonstrating an inability to pay the postage

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inhibit its delivery, on the basis of content. See also *Blount* v. *Rizzi*, 400 U.S. 410 (1971). As we have explained (Gov't Br. 13-14), 18 U.S.C. 1725 is content-neutral. The decisions cited in the text do not intimate that Congress cannot charge a reasonable rate for using the postal system. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), relied upon by amici Piedmont Heights Civic Club, et al. (Br. 18 n.4, 31, 35), likewise concerned government restraints based on content. There was no suggestion in that case that the City of Chattanooga could not have charged a reasonable, non-discriminatory fee for the use of the City's auditorium to show the musical "Hair."

required for the use of letter boxes[4] or a constitutionally significant impairment of their ability to communicate with persons in the community if they do not use letter boxes. Gov't Br. 15-17.[5]

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[4]In arguing that they cannot afford to pay postage, appellees point (Br. 3, 29) to testimony that many civic associations have little money in their treasuries. But appellees have not demonstrated that their *members* and *supporters*, for whose benefit appellees exist, are without the necessary financial resources to pay postage. We appreciate that an association, even one as loosely knit as many neighborhood groups, has an identity that is to some extent distinct from that of its members. But we do not believe an organization's members, if they have adequate funds of their own, can hide behind the veil of the organization's impecunity to assert a personal constitutional entitlement based on a lack of financial resources; nor do we believe that the organization itself can be excused from turning to its own members and supporters for additional contributions before arguing for a constitutional entitlement in its own right based on a lack of funds.

Appellees rely (Br. 29) on only two pieces of testimony for the proposition that civic associations cannot raise the funds necessary to pay postage. The first related to civic groups in New York City, not to appellees (A. 56). The other was a statement by a witness affiliated with the Highlands Civic Association in Westchester County (Tr. 332-333) that its members would "tend to stop being dues-paying members" if dues were increased to cover postage (Tr. 348). Even assuming *arguendo* that this testimony could be regarded as persuasive and applicable to appellees and all of their affiliated organizations, the fact that an association cannot muster financial resources from its members and supporters who prefer not to increase their contributions hardly furnishes a basis for asserting a constitutional right to turn to the Postal Service for comparable support through a waiver of postal fees. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 94-96 (1976).

[5]Appellees also argue (Br. 11-12) that recipients would prefer to have notices placed in their letter boxes rather than left on a doorknob or elsewhere where the circulars might alert potential burglars to the fact that no one is home. It is not clear how a recipient's preference for other methods of delivery or for appellees to be entitled to dispense with paying lawful postage rises to the level a First Amendment right. In any event, if recipients wish to avoid alerting burglars, they may post a

4. Finally, appellees seek to support their right of free access to letter boxes used for the delivery of mail by arguing (Br. 30-39, 57-62) that the purposes underlying 18 U.S.C. 1725 and its regulatory counterparts would not be significantly frustrated if those provisions were not enforced against them. Appellees argue, for example (Br. 37-39, 58), that the purpose of 18 U.S.C. 1725 to protect postal revenues is not advanced by applying the statute to them because civic groups cannot pay postage[6] and the Postal Service therefore would lose no revenue by allowing them to use letter boxes free of charge. But in enacting a statute applicable to an operation as vast and multifaceted as the Postal Service, Congress surely may legislate with the generality of cases in mind without thereby rendering the legislation vulnerable in every individual situation in which a compelling need for the particular restriction cannot be demonstrated. Given the Postal Service's self-evident need

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notice requesting that no circulars be delivered by appellees or may assume the modest cost of purchasing a separate receptacle for receiving such items.

[6]Appellees also renew the argument (Br. 101-103) that 18 U.S.C. 1725 cannot be applied to them because it was intended to bar the deposit only of commercial materials. However, the statute on its face bars the deposit of "*any* mailable matter" (emphasis added) without proper postage, and the legislative history makes clear that Congress and the Postal Service understood that the provision would apply to noncommercial as well as commercial material. See Gov't Br. 5-6 n.5. Moreover, as Congress was aware when it enacted 18 U.S.C. 1725, the pre-existing regulation applicable to rural letter boxes, after which the statute was patterned, excluded noncommercial mailable matter on which postage had not been paid. J.S. App. 26a-27a; see note 1, *supra*. Furthermore, the statutory purposes of protecting postal revenues and preventing the cluttering of letter boxes are advanced by applying the prohibition to noncommercial as well as to commercial matter. Finally, the creation of exemptions in the Private Express statutes for organizations such as appellees' whose members deliver materials without charge (see brief of amici Piedmont Heights Civic Club, et al. 21) demonstrates that Congress knows how to fashion special exemptions in this area when it so desires.

for revenues generally, for example, the Service is not required to make a case-by-case showing of a compelling need for the incremental revenue to be realized from charging postage to each organization or individual who desires to use the postal system to engage in expression protected by the First Amendment. This would inevitably lead to chaos and arbitrary treatment, rather than the desired uniformity, fairness, and ease of administration in establishing standards for access to millions of letter boxes in the country.

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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BRIEF OF AMICI CURIAE INDEPENDENT SECTOR AND THE FOLLOWING MEMBER ORGANIZATIONS INDIVIDUALLY: AMERICAN RED CROSS, EPILEPSY FOUNDATION OF AMERICA, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., NATIONAL CONCILIO OF AMERICA, VOLUNTEER: THE NATIONAL CENTER FOR CITIZEN INVOLVEMENT, AND THE AMERICAN ASSOCIATION OF MUSEUMS; AND THE NATIONAL ASSOCIATION OF NEIGHBORHOODS

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This brief *amicus curiae* is submitted by Independent Sector and the following member organizations individually: American Red Cross, Epilepsy Foundation of America, The National Council of Churches of Christ in the U.S.A., National Concilio of America, VOLUNTEER: The National Center for Citizen Involvement, and the American Association of Museums; and an affiliated organization, The National Association of Neighborhoods, in support of appellee Council of Greenburgh Civic Associations.

INTEREST OF THE AMICI CURIAE

The *amici curiae* on whose behalf this brief is filed are major national voluntary organizations of the United States. All of them are member organizations or affiliates of Independent Sector, an organization created in 1980 to preserve and enhance our national tradition of giving, volunteering and not-for-profit initiative.

The organizations all operate primarily through local affiliates, which in turn depend on citizen participation to carry out their educational and charitable purposes.

These local affiliates often rely on the established custom of distributing notices of meetings and other literature by having volunteers place these materials in mailboxes. Even where this custom has not been established, local affiliates are increasingly turning to volunteer distribution through mailboxes, both because of the high and rising cost of postage, and because of the increasing delays in delivery by the Postal Service.

Unless the decision below is affirmed, local affiliates, on which the strength of these national organizations is based, will find it increasingly difficult to function, and, indeed, as in the situation of appellees here, to survive.

The serious restrictions on the First Amendment rights of appellees, and of the citizens of Westchester County, that flow from application of the prohibitions of 18 U.S.C. § 1725 to the activities of those organizations, are thus replicated on a national scale for the local affiliates of the *amici curiae* here, and particularly for small, local voluntary associations across the country.

SUMMARY OF ARGUMENT

Distribution of literature by voluntary organizations is a protected activity under the First Amendment, and enactments that impair the free exercise of this activity require special scrutiny. Small voluntary organizations across the country rely heavily on distribution of unstamped material by volunteers to mailboxes, and local

affiliates of national voluntary organizations will be increasingly forced to rely on mailbox distributions by volunteers in order to maintain their effectiveness. The statute as applied also amounts to an unconstitutional denial of equal protection of the law to local civic and charitable organizations.

ARGUMENT

I. Distribution of Literature by Voluntary Organizations is a Protected Activity Under the First Amendment, and Enactments That Impair The Free Exercise of this Activity Require Special Scrutiny.

The Court's traditional solicitude for the protection of First Amendment rights need scarcely be documented. In particular, the "[f]reedom to distribute information to every citizen . . . must be fully preserved." *Martin* v. *Struthers*, 319 U.S. 141, 146-147 (1943). Appellant's suggestion (appellant's brief p. 23) that "the effects of the statute on free expression" need only be weighed "against the governmental interests advanced . . . when Congress attempts in some way to regulate the content of speech . . ." overlooks the invalidation of major provisions of the Federal Election Campaign Amendments of 1974 in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), as well as a long line of cases invalidating state statutes and local ordinances under the First Amendment as incorporated into the Fourteenth Amendment, the most recent being *Village of Schaumburg* v. *Citizens For A Better Environment*, 444 U.S. 620 (1980). In *Schaumburg* the Court held unconstitutional a content-neutral local ordinance, quite specific in its provisions, but which the Court found served a legitimate legislative interest in a way that could be "better served by measures less intrusive . . ." (444 U.S. at 637).

In fact, appellant abandons its initial argument. Appellant cites *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), for the proposition that the balancing test is inapplicable "to a content-neutral statute . . . that affects

only the place and manner in which communication may occur." But *Grayned* did not involve a balancing of interests, and appellant's quotation from the *Grayned* opinion omits the first half of the quoted sentence: "Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved . . ." (408 U.S. at 116).

It is the contention of the *amici curiae* that the effect of this statute on small local organizations, and some local affiliates of national voluntary organizations, is to make effective communication impossible between the organization and its members, thereby "abridging the freedom of speech . . . ."

II. Small Local Voluntary Organizations Across the Country Rely Heavily on Distribution of Unstamped Material by Volunteers to Mailboxes; and Local Affiliates of National Voluntary Organizations Will Be Increasingly Forced to Rely on Mailbox Distribution by Volunteers in Order to Maintain Their Effectiveness.

Informal inquiries among member organizations and affiliates of Independent Sector support the evidence introduced at the trial of this case that the distribution of unstamped matter by volunteers to mailboxes is an essential means of communication between a local organization or affiliate and its constituency. This appears to be particularly true of minority organizations. One organization, the National Concilio of America, a Hispanic group, reports that many of its members do not read English and do not open stamped envelopes—which must be addressed in English—because they do not expect to be able to read the contents. Also, many of their members are transients who can only be reached by general neighborhood distributions. Telephone communication requires that the persons to be reached have telephones. The National Association of Neighborhoods, which represents approximately 500 coalitions and federations of neighborhood civic associations, reports that rising postal rates, and the urgent nature of many communications

circulated by its members, make ability to use mailboxes for delivery of unstamped matter of vital importance. Even such an established national organization as the American Red Cross reports that its affiliates in small, unstructured communities regard use of mailboxes as important to their activities.

But more important for the local affiliates of national organizations represented here is the increasing cost and delay in mail service, which makes volunteer delivery to mailboxes more and more necessary in order to maintain the essential links between individual citizens and local affiliates, which are the building blocks of voluntary associational activity protected by the First Amendment. Evidence in the record below on the difficulty and ineffectiveness of bulk mail for local distribution, and the recent and prospective increases in first-class mail rates underline the concern of the *amici curiae*.

The impracticality of employing other receptacles or points of attachment than mailboxes (door knobs, scotch tape, under-the-door insertion) is amply demonstrated in the record below.

III. The Statute as Applied Amounts to an Unconstitutional Denial of Equal Protection of the Laws to Local Civic and Charitable Organizations.

Recent postal regulations now provide exemptions from the statutory ban on private mail services competing with the U.S. Postal Service for college and university mail delivery and for very rapid (essentially less than 24-hour) delivery services, 39 CFR §§ 320.4, 320.6. The latter exemption is presumably intended to cover the expensive services provided by organizations like Federal Express and Sprint, which are more and more used by businesses and law firms.[1]

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[1] Respondent informs us that extension of the filing date for its brief in this Court to April 10th was conditioned on mailing the brief by Federal Express.

"Mailable matter" carried by Federal Express can presumably be placed in mailboxes without incurring the penalty prescribed under 18 U.S.C. § 1725, since the effect of the exemption in 39 CFR § 320.6 is to omit the requirement for payment of "lawful postage", and therefore the carrier could not be said to have "intent to avoid payment of lawful postage".

The effect of the regulation as enforced is to extend to those who can afford it a privilege that is not made available to these appellees or to the *amici curiae.*

Further, it could be argued that in fact delivery of material by local organizations could be construed to meet the requirements of Section 320.6, which provides in subsection (b) (1):

> For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be completed within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. For other letters, delivery must be completed within 12 hours or by noon of the addressee's next business day. The suspension is available only if the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within these time limits. For any part of a shipment of letters to qualify under this paragraph (b), each of the letters must be extremely urgent.

Hand deliveries accomplished by volunteers would seem necessarily to meet these time requirements from the time when the volunteer is "dispatched" to when he or she arrives at the last residence where the circulars or the material are to be delivered. For communications sent by Federal Express, the test of extreme urgency is presumably the willingness of the sender to pay the substantial additional charge. In the case of communi-

cations dispatched by hand through volunteers, the test may be the willingness of the volunteer to undertake the assignment.

There is no discernible reasonable basis for discrimination in favor of college and university organizations, and private express services mainly utilized by business entities, and against local civic associations and affiliates of national voluntary organizations.

As the court below noted, communication of the kind delivered by respondents or the *amici* often involve "urgent matters" not permitting the delay of normal mailing (490 F. Supp. at 160).

CONCLUSION

For the foregoing reasons, the *amici curiae* request the Court to affirm the judgment of the court below that 18 U.S.C. § 1725 is "in violation of the First Amendment" as applied to local civic and charitable organizations and local affiliates of national voluntary organizations.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE,

Appellant

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS

AND

SAW MILL VALLEY CIVIC ASSOCIATION,

Appellees and Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO AS *AMICUS CURIAE*

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Appellees and Cross-Appellants

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BRIEF FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The National Association of Letter Carriers, AFL-CIO ("NALC") respectfully submits this brief pursuant to Rule 36(2) of this Court, upon consent of all parties, in support of the position of appellant United States Postal Service.

NALC is the certified exclusive collective bargaining representative of the more than 180,000 active city letter carriers who are employed by the U.S. Postal Service nationwide. These letter carriers depend for their livelihood upon the continued economic vitality of the Postal Service. Letter carriers likewise depend

upon the Postal Service's statutory responsibility to ". . . place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States."[1] Thus, any erosion of the Postal Service's revenue base—and/or any reduction in the volume of mail carried by the Postal Service—necessarily threatens economic harm to letter carriers.

NALC believes that the decision below, read broadly, tends to undermine the integrity of those laws upon which the Postal Service depends for the maintenance of its mail volume and revenues. Accordingly, NALC has a substantial interest in the outcome of this case.

Our aim is to assist the Court in understanding the overall context in which this case arises by discussing certain considerations not raised below. Most significant is the revolution in electronic telecommunications technology presently confronting the Postal Service which threatens dramatic reductions in the demand for conventional mail service by business institutions and banks. These technological developments and other factors have put the Postal Service in a position where it can ill afford any erosion of its traditional revenue base. For this reason alone, the decision below should be reversed or, at the very least, substantially narrowed.

SUMMARY OF ARGUMENT

1. The decision below rests on two conclusions: (1) that imposition of postage charges, by itself, constitutes an infringement upon First Amendment speech rights; and (2) that the Postal Service's interest in protecting the integrity of its revenue base is insufficient to justify any incidential infringement of appellees' ability to communicate caused by the postage requirement. Both conclusions are erroneous.

2. Statutory restrictions on private delivery of mail have been imposed by Congress since the founding of the Republic.

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[1] Postal Reorganization Act, 39 U.S.C. §101(c).

Continued enforcement of such restrictions is essential to preserve the Postal Service's revenue base. This is especially true in the 1980's because a burgeoning revolution in telecommunications technology threatens drastic reductions in the demand for conventional postal services.

3. The demise—or substantial impairment—of traditional universal postal services would have constitutional ramifications. The integrity of the Postal Service's revenue base is a matter of great social concern.

ARGUMENT

Regardless of the Outcome Here, the Court's Decision Should Broadly Affirm the Validity of Statutory Restrictions on Private Delivery of Mail to Preserve the Postal Service's Revenue Base.

1. The statute at issue in this case, 18 U.S.C. §1725, obviously does not purport to prohibit the appellee civic associations from engaging in door-to-door distribution of their materials. The statute merely requires that postage be paid as a condition of access to Postal Service approved letter boxes. To hold that enforcement of Section 1725 violates appellees' rights under the First Amendment, the court below was required to accept the validity of two propositions: (1) that imposition of postage charges, by itself, constitutes an infringement upon First Amendment speech rights; and (2) that the Postal Service's interest in protecting the integrity of its revenue base is insufficient to justify any incidental infringement of appellees' ability to communicate caused by the postage requirement.[2]

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[2] Section 1725 was enacted in 1934 to stem the loss of a substantial amount of postal revenues caused by the practice of many companies of using messengers to deposit statements of account and other circulars in letter boxes without payment of postage. *See*, H.R. REP. No. 709, 73d Cong., 2d Sess. (1934); 75 Cong. Rec. 5575-5577 (1932) [House debates on predecessor bill that was not enacted].

While NALC believes that both propositions are erroneous,[3] it is the second principle which we find cause for special concern. As discussed below, Postal Service revenues depend on the continued enforcement of a group of federal laws, known as the Private Express Statutes, restricting private delivery of mail.[4] Regardless of the outcome here, the validity of those laws—and the legitimacy of the Government's interest in protecting postal revenes—should be broadly affirmed.[5]

2. Generally, throughout the world, postal systems operate under government monopolies.[6] The United States has been no exception. Statutory restrictions on private delivery of mail have been imposed by Congress since the founding of the Republic.[7]

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[3] The Court has already held that the marginal cost of postage is not in itself an infringement of free speech. Jones v. North Carolina Prisoner's Union, Inc., 433 U.S. 119, 130-131 (1977). *See also*, Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d 4 (2d Cir. 1973); Associated Third Class Mail Users v. United States Postal Service, 600 F.2d 824 (D.C.Cir.), *aff'g* 440 F.Supp. 1211, 1216 (D.D.C. 1977), *cert. denied*, 444 U.S. 837 (1979). *Cf.* Ex Parte Jackson, 96 U.S. 727, 732 (1877); United States Postal Service v. Brennan, 574 F.2d 712, 715 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. Black, 569 F.2d 1111 (10th Cir.), *cert. denied*, 435 U.S. 944 (1978)(affirming constitutionality of Private Express Statutes).

[4] The Private Express Statutes are presently codified at 39 U.S.C. §§601-606 and 18 U.S.C. §§1693-1697.

[5] The prohibitions set forth in the Private Express Statutes go no further than those imposed by §1725. The Statutes permit delivery of mail, provided only that proper postage be paid. *See*, 39 U.S.C. §601. Thus it would seem that the rationale of the decision below could lay the ground work for future constitutional challenges to the validity of the Private Express Statutes.

[6] *See* BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE, 93d CONG. 1ST SESS., STATUTES RESTRICTING PRIVATE CARRIAGE OF MAIL AND THEIR ADMINISTRATION, A REPORT TO THE PRESIDENT AND THE CONGRESS, HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, Comm. Print No. 93-5 (June 24, 1973) App. D [hereinafter cited as BOARD OF GOVERNORS REPORT] (finding postal monopolies operative in Canada, Denmark, France, Great Britain, India, Israel, Japan, Republic of South Africa, and West Germany).

[7] The first comprehensive Postal Ordinance, enacted in 1782 by the Continental Congress under the Articles of Confederation, generally prohibited private carriage of "letters, packets, and other dispatches." This postal monopoly was extended after the Constitution took effect in 1789 and reestablished in the first comprehensive postal act adopted by the new Congress in 1792. Amendments to these laws in 1825, 1827 and 1845 placed the Private Express Statutes in the form in which they remain today. BOARD OF GOVERNORS REPORT, *supra* note 6, at 57-59.

The rationale for these laws emerges from the Postal Service's historic mandate to provide universal mail service at uniform rates.[8] By restricting private mail delivery, the statutes guarantee to the Postal Service the mail volume and consequent revenues needed to provide service to all parts of the nation including those areas (e.g., rural areas and small towns) which, at uniform rates, cannot be served at a profit.[9]

The need to maintain restrictions on private delivery in the 1980's is more urgent than ever. In recent reports, both the Board of Governors of the Postal Service and the Commission on Postal Service strongly advised against any relaxation of the traditional restrictions on private delivery of mail.[10] These recommendations are based on several factors. First, Congress has directed the Postal Service through the Postal Reorganization Act to achieve greater self-sufficiency.[11] In anticipation of this development, the Act provided for a scheduled reduction in federal appropriations to the Postal Service.[12] Additional cuts in the postal subsidy can be expected as part of the effort to reduce inflation in the national economy. Thus, the Postal Service is more than ever dependent on its self-generated revenues.

Second, recent studies have confirmed that a substantial portion of first class mail volume is vulnerable to diversion to private carriers, and that private carrier service can be launched with relatively modest venture capital.[13] An erosion of current legal restrictions would permit private carriers to skim off the Postal Service's most profitable business, resulting in a sharp reduction in Postal Service volume and revenue and an inevitable decline in service to thinly populated and low income areas.[14]

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[8] *See* 39 U.S.C. §§101(a), 101(b) and 3623(d).

[9] *See* Craig and Alvis, *The Postal Monopoly: Two Hundred Years of Covering Commercial as Well as Personal Messages*, 12 U.S.F. L. REV. 57, 59-62 (1977).

[10] BOARD OF GOVERNORS REPORT, *supra* note 6, at 9-10; COMMISSION ON POSTAL SERVICE, REPORT, 72 (1977).

[11] *See* H.R. REP. No. 1004, 91st Cong., 2d Sess. 10 (1970).

[12] *See* 39 U.S.C. §§2401(b)(1) and (2).

[13] BOARD OF GOVERNORS REPORT, *supra* note 6, at 119-120.

[14] *Id.* at 9-10

But beyond these traditional considerations is the single most significant threat to the continued survival of the Postal Service: the burgeoning revolution in telecommunications technology. Various electronic communications systems are now available which may render obsolete many traditional postal services, particularly in the areas of business communications and banking.[15] Widespread commercial acceptance of these various new technologies may cause dramatic reductions in the demand for conventional mail service during the next two decades. For example, a recent General Accounting Office report, synthesizing the results of four studies published between 1977-1980, projects a diversion to electronic communications systems of 28.3 billion pieces of mail by the year 2000.[16] This represents almost half of the total first class mail volume handled by the Postal Service during fiscal year 1980.

Such reductions of first class mail volume would substantially undercut the ability of the Postal Service to continue its traditional services. With the major costs of the Postal Service fixed, and volume—and thus revenue—declining markedly, productivity would fall per message and costs skyrocket. The public would then be compelled to expend an inordinate sum on both postage and subsidies to maintain a national system of communications for those messages either not technologically susceptible to

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[15] For descriptions and analysis of electronic communications systems, *see* Geller and Brotman, *Electronic Alternatives to Postal Service*, in COMMUNICATIONS FOR TOMORROW, (Glen O. Robinson, ed. 1978) [hereinafter Geller & Brotman]; Wiley and Adams, *Should FCC or USPS Control Electronic Mail?*, Legal Times, Sept. 16, 1979; Alexander, *The Postal Service Would Like to be the Electronic Mailman, Too*, Fortune, June 18, 1979; OFFICE OF TELECOMMUNICATIONS POLICY, U.S. DEP'T OF COMMERCE, THE POSTAL CRISIS: THE POSTAL FUNCTION AS A COMMUNICATIONS SERVICE (1977); *Experiments in Electronic Mail*, National Journal, November 3, 1979; NATIONAL RESEARCH COUNCIL, ELECTRONIC MESSAGE SYSTEMS FOR THE U.S. POSTAL SERVICE (1976).

[16] GENERAL ACCOUNTING OFFICE, IMPLICATIONS OF ELECTRONIC MAIL FOR THE POSTAL SERVICE'S WORK FORCE, 22-3 (Feb. 6, 1981). *See also*, NATIONAL RESEARCH COUNCIL, ELECTRONIC MESSAGE SYSTEMS FOR THE USPS (1976) (finding that-one third of all mail, including one-half of profitable first class mail, is susceptible to electronic transmissions); COMMISSION ON POSTAL SERVICE, REPORT, *supra*, note 10, at 574 (projecting a 23% reduction in first class mail volume due to electronic systems diversion by 1985); and Geller and Brotman, *supra*, note 15, at 326.

electronic transmission or which are—from the preception of private enterprise—unprofitable.[17]

Based on the foregoing factors, the Commission on Postal Service has concluded that electronic communications constitute a major threat to the survival of the Postal Service:

> *We conclude that impact* [of electronic communications] *will be of sufficient magnitude to constitute a major threat to the basic business of the Postal Service. Procrastination by the Postal Service to a time when a significant volume has been diverted and the magnitude of the impact can be verified will be too late for the Postal Service to take positive action.*[18]

3. The demise—or substantial impairment—of traditional universal postal services would have obvious constitutional ramifications. It would represent in itself an abandonment of a constitutionally based, judicially recognized, sovereign, federal duty.[19] Moreover, there is certainly no reason to expect that computerized telecommunications equipment will be readily available to low income households or in thinly populated rural areas. The absence of traditional postal services would leave segments of the American people without access to a low-cost paper-copy communications service and thus inhibit the free flow of information as guaranteed by the First Amendment.

NALC readily acknowledges that the injunction granted to the appellee civic associations will not, by itself, precipitate the demise of the Postal Service. Our point is that the integrity of the Postal Service's revenue base is a matter of great social concern. Accordingly, the Court's decision in this case should broadly affirm the validity of the statutory restrictions on private mail delivery upon which postal revenues depend.

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[17] *See* COMMISSION ON POSTAL SERVICE, REPORT, *supra*, note 10, at 544-5, for projections of the impact of electronic diversions on postal rates.

[18] *Id.* at 23 (emphasis in original).

[19] *See* In Re Debs, 158 U.S. 564 (1895); Searight v. Stokes, 44 U.S. (3 How.) 150, 169 (1845).

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE PIEDMONT HEIGHTS CIVIC CLUB, INC., AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, NEW YORK CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

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LEGISLATIVE HISTORY:

H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934) 44

S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934) 44

INTEREST OF THE AMICI[1]

Piedmont Heights Civic Club, Inc. ("Piedmont Heights") is a Georgia nonprofit corporation formed in 1956 by residents of Piedmont Heights, a community of approximately 300 households in northeast Atlanta, Georgia. More than half of the families in the community are active participants in this civic organization.

The organization has no paid staff. All activities of the organization are carried out by volunteers. From its inception, Piedmont Heights deposited civic notices in mailboxes as its principal means of communication with residents of the community. Since most of the mailboxes in Piedmont Heights are located at curbside, leaflets can be quickly distributed by car. Leaving leaflets at the door, necessarily on foot, requires substantially more

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1. The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

person hours of effort than does distribution of civic notices to mailboxes.

In August, 1980, Piedmont Heights was notified that copies of one of its leaflets found in mailboxes had been confiscated by Postal Service officials. A fine was assessed by the Postal Service and paid by Piedmont Heights.

Subsequent to the assessment of the fine, Piedmont Heights has found that there is no satisfactory alternative to mailbox distribution. Civic leaflets left at the doors of residences are likely to be rained on, blown away, or overlooked. Subsequent to the fine, the organization has received serious criticism from its members about their failure to receive civic notices from the organization.

Because the organization has insufficient funds and resources to make use of the mails for its communications with neighborhood residents -- much less to obtain and maintain address lists -- Piedmont Heights has never

been able to use the mails for its civic communications. As a practical matter, use of the mails is frequently forclosed because of timing: notice of meetings, hearings, and other occurrences of importance to the neighborhood is often obtained too late to permit mail delivery of civic notices to residents.

Because its capacity to communicate with area residents was severely hampered, Piedmont Heights contacted pro bono counsel in late 1980. The filing of litigation was deferred when counsel became aware that this Court would hear the present case, involving the same First Amendment claims on which the Piedmont Heights' suit would have been based.

The trial court's decision in this case was limited to a holding that the statute was unconstitutional as applied to the plaintiffs below. Amici submit, however, that this Court should find the statute unconstitutional to the extent that it is construed to prohibit the use of mailboxes for communication by all

nonprofit voluntary civic organizations.[2] Although the present plaintiffs are located in a single region of the country, the witnesses at trial included a variety of representative individuals, organizations and governmental or quasi-governmental entities, both rich and poor, in urban, rural, and suburban areas. Their experience may be regarded as representative of the operation of Section 1725 throughout the country, especially in view of the nationwide unformity of design and placement of mailboxes imposed by postal regulations. The Postal Service does not contend otherwise, but, on the contrary, argued the typicality of the facts presented below as a basis for urging that probable jurisdiction be noted by this Court. Any decision of the Court should therefore recognize that, as in door-to-door

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2. Although the trial court construed the statute to bar mailbox leafletting by nonprofit civic organizations, that construction is by no means required by the language or the legislative history of Section 1725. See Section IV of this Brief, at 44-46, infra.

or sidewalk handbilling cases, the issues before the Court are not limited by the specific factual setting in which the case arose, but support a holding affecting civic associations nationwide.

The American Civil Liberties Union of Georgia and the New York Civil Liberties Union are state affiliates of the American Civil Liberties Union, a nationwide, non-partisan organization of over 200,000 members dedicated to protecting the fundamental rights of the people of the United States.

The ACLU has long supported the free speech and associational rights protected by the First Amendment. In pursuit of the ACLU's goals, ACLU attorneys have litigated and continue to litigate numerous cases involving the First Amendment.

The case sub judice has important First Amendment implications which go beyond affecting only the parties directly involved in this

litigation. Many civic organizations throughout the Nation depend upon the use of mailboxes to communicate their views and develop their associations. A decision on the merits by this Court will unquestionably affect the communication and association activities of other groups and organizations.

Because of Amici's concerns about the First Amendment issues present, and because counsel for the parties may not focus on the broader issues involved, Amici file this brief.

SUMMARY OF ARGUMENT

Nonprofit neighborhood civic associations and their members have First Amendment rights to deliver and receive civic notices and to engage in associational activity. These fundamental rights are severely abridged by Appellant's prohibition, through enforcement of 18 U.S.C. §1725, of mailbox distribution of civic notices.

Appellant has the burden of establishing a compelling governmental interest to justify

such abridgement and of showing that the restriction is narrowly tailored to serve such an interest. No such showing has been made.

None of the asserted governmental justifications for abridgement of these fundamental First Amendment rights passes constitutional muster. Appellant's chief justification is its argument that dilution of postal revenues will result from permitting civic organizations to deposit their leaflets in mailboxes. But Congress has previously exempted from the postal monopoly all delivery by private hands without compensation, leaving the issue in this case whether civic organizations may use a mailbox as the place of deposit for civic notices. Since no competition with the Postal Service is involved, Appellant's primary justification fails as a compelling interest, much less one sufficient to outweigh the infringement of First Amendment freedoms. The other asserted justifications -- mail security, overcrowding of the mailbox and

homeowner privacy interests -- are speculative at best and fall far short of the requisite governmental showing.

Amici submit that this case is subject to the compelling interest test. Yet, even if Section 1725 is considered to be a time, place, and manner regulation, the applicable First Amendment test of constitutionality is not met.

Alternatively, Amici suggest that Section 1725 can and should be construed to be inapplicable to the communication and associational activities of nonprofit neighborhood associations.

ARGUMENT

I. SECTION 1725 INFRINGES APPELLEES' PROTECTED FIRST AMENDMENTS RIGHTS

Three separate but interrelated communication rights are abridged by Section 1725: the right of Appellees to distribute information free of unnecessary restraint; the concomitant right of householders to receive the same information; and finally the associational interest to which this communication is vital.

A. Enforcement of Section 1725 Abridges Appellees' Right to Disseminate Information

This Court has long held that the distribution and circulation of pamphlets and leaflets is a protected First Amendment right. See Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets)"; see also, Organization For A Better Austin v. Keefe, 402 U.S. 415, 417 (1971) ("the activity of peaceful pamphleteering is a form of communication protected by the First Amendment"). Similarly, a long line of cases has held that the right to distribute literature and disseminate information door-to-door is protected by the First Amendment. See, e.g., Martin v. Struthers, 319 U.S. 141, 164 (1943); Schneider v. State of New Jersey, 308 U.S. 147, 152 (1939). This Court has recently reiterated the importance of door-to-door distributions. In Village of Schaumburg v. Citizens For A Better Environment,

444 U.S. 620, 636-639 (1980), an ordinance prohibiting persons from soliciting door-to-door unless 75% of the funds collected would actually be used for charitable purposes was held unconstitutional. As this Court recognized, the village's interest in preventing fraud and protecting public safety and residential privacy was insufficient to justify the ordinance's abridgement of First Amendment rights.

B. Enforcement of Section 1725 Abridges The Right Of Community Residents To Receive Information Concerning Community Affairs

The First Amendment protects the right of community residents to receive information as well as the right of community associations to distribute leaflets. This Court's decisions establish that freedom of speech "necessarily protects the right to receive information and ideas." Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972). See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748, 756-757 (1976); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Martin v. Struthers, 319 U.S. 141, 143 (1943).

The right to receive information is directly implicated when the government attempts to regulate delivery of written communication. In Procunier v. Martinez, 416 U.S. 396, 408 (1974), when considering censorship of prison inmates' mail, this Court stated:

> "Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of a communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech."

This principle was also applied in Lamont v. Postmaster General, 381 U.S. 301 (1965), where this Court struck down a postal regulation which restricted a citizen's right to receive mail sent from outside the country. The recipient's First Amendment guarantees protected his right to receive his mail without governmental interference.

C. Enforcement of Section 1725 Abridges The Associational Right Of Civic Organizations And Members

The First Amendment also protects the associational rights of civic association members. A neighborhood civic association cannot organize or continue without the ability to communicate. Circulating leaflets, house-to-house, is an essential means by which individuals may ban together with other like-minded residents. Furthermore, the ability to distribute information is essential to the function of informing neighborhood residents of meetings, events, and issues of public concern. An

association cannot exist if it is unable to distribute information to all households within the community in a prompt, effective and unburdened manner.[3]

This Court has repeatedly held that the First Amendment protects associational rights of citizens. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945); DeJonge v. Oregon, 229 U.S. 353 (1937). The First Amendment protects freedom of association not only against direct abridgement, but also against governmental limitations that burden its exercise. Id.

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3. The trial court found that plaintiffs' organizational activities, including their ability to alert their constituencies to local governmental meetings and other activities, had been significantly curtailed, and there was a likelihood that some of the plaintiffs might be forced out of existence by the enforcement of the statute. 490 F.Supp. at 163.

D. Enforcement Of Section 1725 Strikes At The Heart Of First Amendment Freedoms

Appellees' leaflets communicate issues of neighborhood, and therefore public, importance. Discussion of public issues is clearly "at the heart of the freedom to speak," Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 326 (1980), thereby ranking high among the freedoms specially protected by the First Amendment. See Carey v. Brown, 65 L.Ed.2d 263, 273 (1980).

Free discussion of such issues, the cornerstone of our liberty, is involved here in three distinct but inseparable ways: Appellees' freedom to distribute literature is unduly restricted; neighborhood residents' right to receive communication is abridged; and, the associational rights of all are undercut.

These intertwined interests cannot be abridged absent compelling governmental interests. As discussed below, Appellant fails to show a sufficient interest, whatever First Amendment test is applied.

II. THE STATUTE'S RESTRICTION OF APPELLEES' FIRST AMENDMENT RIGHTS IS NOT A NARROWLY TAILORED MEANS OF SERVING A COMPELLING GOVERNMENTAL INTEREST

A. Appellant's Ban On Use Of Mailboxes Requires Application Of The Compelling Interest Test

Amici submit that the appropriate First Amendment test to resolve the issue presented in this appeal is the compelling interest test most recently summarized by this Court in Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 330 (1980):

> "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See First National Bank of Boston v. Bellotti, 435 US, at 786, 55 L Ed 2d 707, 98 S Ct 1407; Buckley v. Valeo, 424 US 1, 25, 46 L Ed 2d 659, 96 S Ct 612 (1976) (per curiam). See, also Bates v. Little Rock, 361 US 516, 524, 4 L Ed 2d 480, 80 S Ct 412 (1960)"

This Court has further held that the gain to the subordinating interest must outweigh the incurred loss of protected rights and be

narrowly drawn. Elrod v. Burns, 427 U.S. 347, 362 (1976).

Appellant argues, to the contrary, that the applicable First Amendment test is whether the asserted content-neutral regulation of the time, place, and manner of exercising First Amendment rights serves a significant governmental interest and ample alternative means of communication remain. Appellant's Brief, at 13-14, 19-22. Section 1725 is not, however, a regulation of the time, place, and manner of exercising First Amendment rights. It is a total ban, for all time, on the exercise of those rights with regard to the principal means of distributing civic notices and leaflets. Appellees and other citizens similarly situated are flatly prohibited, under threat of criminal penalty, from using the mailbox as a method of communicating information and ideas, unless they place adequate postage on the leaflets. The Appellant's "regulation" argument runs afoul of this Court's admonition in Grayned v.

City of Rockford, 408 U.S. 104, 117 (1972), that "free expression 'must not, in the guise of regulation, be abridged or denied.'"

Section 1725's prohibition on one method of communication is indistinguishable from the prohibitions on methods of communication invalidated by this Court in Martin v. Struthers, supra, and Schneider v. State of New Jersey, supra. In both Martin and Schneider, this Court struck down ordinances prohibiting communication by door-to-door solicitation, even though other alternative means of communication remained. In Schneider this Court also held unconstitutional ordinances prohibiting communication by distributing leaflets on public sidewalks. This Court refused to accept the governmental argument that the challenged prohibitions represented merely regulations of the time, place, and manner of exercising protected First Amendment rights. The prohibitions in Martin and Schneider are directly analogous to the prohibition of Section 1725. Each prohibition represents a ban on a particu-

lar method or locus of communication and none of the prohibitions is accurately characterized as a mere regulation of time, place, or manner.[4]

B. Appellant Failed To Carry Its Burden Of Proof That Section 1725's Prohibition Represents A Compelling Governmental Interest.

Restrictions on free speech may be justified only if the government proves that the subordinating interests are compelling, and that the restrictions result from a statute narrowly tailored to satisfy that interest. Appellant here seeks to justify its abridgement of First Amendment rights by asserting four governmental interests: (1) postal service revenues; (2) mail security; (3) avoiding mailbox overcrowding; and (4) postal customers' privacy.

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4. Appellant concedes in its Brief, at 15-16 n.10, that Martin and Schneider involved general bans on communication methods but, without any supporting argument or rationale, concludes that "[n]o such general ban on a method of communication is at stake here." For the reasons asserted above, Appellant's feeble attempt to distinguish Martin and Schneider fails. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (a ban on access to a place of communication equals a prior restraint).

Appellant's Brief, at 20-22. Upon examination, none of these asserted justifications constitutes a compelling governmental interest sufficient to justify the substantial abridgement of First Amendment rights resulting from the application of Section 1725.[5]

1. Speculative Revenue Losses Are Not A Compelling Governmental Interest

Appellant's chief argument justifying Section 1725 is that it "is designed to prevent the dilution of revenues through the private delivery of unstamped mailable matter." Appellant's Brief, at 20. Appellant argues that mailbox leafletting by Appellees dilutes postal revenues. This argument does not apply in the present case.

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5. The findings of fact of the trial court on these issues are conclusive unless clearly erroneous. Rule 52(a), Fed. R. Civ. P. Appellant makes no explicit effort in its Brief to show clear error. This failure to establish that the findings are clearly erroneous requires affirmance. However, Amici further submit that the asserted justifications are inadequate as a matter of law, and that any ruling of this Court should extend to all similar organizations.

Appellees' mailbox distribution does not undercut expected Postal Service revenue. Appellant concedes that leaflets could be distributed in other locations, e.g., placed under doors or doormats, hung on doorknobs, tacked to a door post, or taped to the post on which the letter box rests.[6] Appellant's Brief, at 15. Thus, the issue here is neither Appellees' conveyance of handbills, nor postal revenues, but only the deposit of leaflets in the mailbox without postage.

A fatal flaw in Appellant's revenue dilution argument is that Congress has already created an exemption for distribution of leaflets such as those involved here. The Private Express Statutes,[7] reflecting a congressional

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6. The trial court held that none of these alternatives was particularly effective and that Appellant's restriction on mailbox delivery accordingly "constitutes a serious burden on [Appellees'] ability to communicate with their constituents." 490 F.Supp. at 160.

7. 39 U.S.C. §§601-606; 18 U.S.C. §§1693-1699.

policy to preserve the commercial monopoly of the federal postal system, not only prohibit competition in the conveyance of mailable materials but also contain an exemption for organizations such as Appellees.

> "This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only . . . ." 18 U.S.C. §1696(c) (emphasis added).

In other words, Congress has already recognized that the purpose of the postal monopoly[8]

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8. The purpose of the Private Express Statutes is not simply to protect the government's postal revenues. Rather, it is to prevent erosion of significant cost-spreading mechanisms by prohibitting commercial competition in local or other specialized markets where costs are cheaper than the national average. See Associated Third-Class Mail Users v. United States Postal Service, 600 F.2d 824, 826-7 (D.C.Cir. 1979):

> "For example, the cross-subsidization inherent in establishment of uniform rates regardless of distance for each class of sealed mail pursuant to 39 U.S.C. 3623(d) (1976) is inconsistent with a fully competitive market, as is the decision to locate post offices in some out-of-the way places."

[footnote continued on next page]

is not affected by permitting some postage-free distribution. Since Appellees' leaflets are carried by volunteers, 490 F.Supp. at 160, the statutory exemption for delivery by "private hands without compensation" clearly applies to the leaflet distribution activities of such civic organizations. Congress has expressly authorized Appellees' distribution without payment of postage. The only question remaining is where leaflets may be left. In this context, the trial court was surely correct in rejecting Appellant's contention that postal revenues are or would be affected by Appel-

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[footnote continued from previous page]

See also Blackham v. Gresham, 16 Fed. 609 (S.D.N.Y. 1883); National Association of Letter Carriers v. Independent Postal System, 470 F.2d 265 (10th Cir. 1972) (upholding broad definition of "letter").

Appellant's reliance on the foregoing decisions in the present action is misplaced. All of those cases were decided not under Section 1725, but under the Private Express Statutes and involved commercial competition with the Postal Service. Furthermore, none of those cases decided First Amendment issues.

lees' means of communicating.[9]

Appellant's dilution of revenue argument is further undermined by the numerous exemptions, allowing distribution without postage, created by Appellant's own administrative definition of the term "letter." 39 C.F.R. Part 310. These exemptions include labels, legal documents, telephone directories, catalogues of twenty-four pages or more, stationery, photographic materials to or from the processor, checks, telegrams, computer programs, and a variety of other classes of communications. Appellant has also suspended the Private Express Statute, under 39 C.F.R. Part 320, for university mail systems and "urgent letters." These exemptions and suspensions demonstrate that, notwithstanding the asserted monopoly interest,

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9. The district court found that certain organizations were unable to distribute following enforcement of Section 1725. 490 F.Supp. at 163. Although the Postal Service is not required to subsidize non-profit organizations, the First Amendment prohibits it from justifying the abridgement of free speech rights on dilution of revenue grounds when the effect of Section 1725 is to put an end to dissemination of leaflets by neighborhood civic organizations.

a wide variety of materials may be carried without postage. These exemptions dilute the Postal Service revenues; yet, such dilution is permitted even though Appellees' First Amendment rights are of a higher order.[10]

Appellant concedes, as it must, that the source of its monopoly power is only a proprietary function and not an exercise of police power. Appellant in this case has acted only as the "proprietor of a particular economic enterprise, the postal system." Appellant's Brief, at 15-16 n.10. This proprietary function, however, is not a compelling governmental interest.

Through the enforcement of Section 1725, Appellant imposes a user fee or license tax on Appellees' use of mailboxes. See Appellant's

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10. The existence of such exemptions and suspensions demonstrates that a more narrowly tailored statute would protect the postal service's interest in its monopoly as well as would the complete prohibition of Section 1725.

Brief, at 15-16 n.10. Since that use does not require postal services, the postage fee for deposit of a civic leaflet bears no relationship to governmental expenses.[11] A license tax unrelated to the costs of services is proscribed where First Amendment rights are abridged. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943) ("the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down.")

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11. Appellant asserts that a piece-by-piece examination of all items placed in mailboxes by civic organizations would be burdensome and costly to the Postal Service. The district court rejected this argument because it found that examination of items in the mailbox is a routine part of a postal worker's duties necessary to identify items such as outgoing letters. 490 F.Supp. at 162-63. As the district court also recognized, the postal worker who has reviewed an example of a civic organization leaflet at one mailbox can easily recognize at a glance identical leaflets found in other boxes in the neighborhood. Id.

Furthermore, this Court has long held that any marginal additional effort required in the performance of normal governmental functions such as law enforcement, street cleaning and mail delivery, is simply the cost of having a society in which free speech is permitted and cannot justify an abridgement of that right. See, e.g., Martin v. Struthers, 319 U.S. 141, 143 (1943); Schneider v. State of New Jersey, 308 U.S. 147, 162 (1939).

In summary, no compelling interest based on Appellant's revenue argument has been shown.

2. Speculative Concerns About Security Of The Mails Are Not A Compelling Governmental Interest.

Appellant also asserts that Section 1725 "plays a role in protecting the security of the mails from theft and tampering." Appellant's Brief, at 21. The district court found that failure to enforce Section 1725 against civic organizations would not cause a "significant reduction in the government's ability to protect the mails by investigating and prosecuting mail theft, mail fraud, or unauthorized mail delivery service," 490 F.Supp. at 163, especially in view of the existence of other specific statutes prohibiting unlawful activities.[12]

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12. The Criminal Code provides the necessary protection for security of the mails. See, e.g., 18 U.S.C. §§1341, 1708. Moreover, this approach represents the narrow tailoring of governmental regulations where First Amendment rights are involved. See, e.g., Elrod v. Burns, 427 U.S. 347, 363 (1976); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972).

As Judge Kaufman observed when the initial dismissal of this case was reversed by the Second Circuit, Section 1725 does not prohibit private citizens from depositing mail bearing postage. 586 F.2d 935, 938 (2d Cir. 1978). The same opportunity for theft exists in this situation as when citizens deposit unstamped leaflets.

In short, Appellant's security and prevention of fraud arguments are indentical to those previously rejected by this Court in Martin v. Struthers, 319 U.S. 141, 148 (1943); and in Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 638-39 (1980). They are equally unpersuasive in this case.

3. Speculative Concerns About Overcrowding In The Mailbox Are Not A Compelling Governmental Interest.

Appellant further seeks to justify its enforcement of Section 1725 on the ground that it protects against mailbox overcrowding. The

district court correctly found this claim to be unsupported and speculative. 490 F.Supp. at 161, 163. Certainly, Appellant's unsubstantiated assertion cannot outweigh the substantial infringement of Appellees' First Amendment rights. Even if such a showing had been made, the narrow tailoring requirement imposes a duty to protect its minimal interest in preventing mailbox clutter with carefully drawn measures, e.g., restriction on the size of materials left in the mailbox. The complete ban on any use of the mailbox, foreclosing an important channel of communication, cannot be justified by a hypothetical concern about overcrowding.

4. Asserted Homeowner Privacy Interests Are Not A Compelling Governmental Interest.

Appellant argues, as one further justification for Section 1725, that enforcement of the statute protects the privacy interests of homeowners. Appellant asserts that the homeowner expects that no one other than members

of his household and postal employees will look into his mailbox. It should be noted at the outset that concern for homeowner's privacy interests is not evident from the statutory scheme, given an exception for stamped materials which cuts directly against Appellant's assertion.

The district court rejected Appellant's privacy arguments because (1) Appellant did not have standing to raise the privacy interests of homeowners, and (2) homeowners are free to protect their own interests by posting no trespassing signs and by enforcing local trespass laws. 490 F.Supp. at 163 n.3. This ruling simply applied prior holdings of this Court. In Martin v. Struthers, 319 U.S. 141, 143-44 (1943), Justice Black, in discussing the power of a community to restrict door-to-door distribution of leaflets by statute, observed that the ordinance at issue "does not control anything but the distribution of literature, and in that respect it substitutes

the judgment of the community for the judgment of the individual householder." Such substitution of judgment, the Court held, was impermissible because homeowners can protect their privacy interest by enforcement of the trespass laws. The Court thus concluded that the decision whether to receive information must rest with the individual homeowners rather than the Government. Accord, Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. State of New Jersey, 308 U.S. 147 (1939).

More recently, in Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319 (1980), this Court stated that the recipient's privacy interest in not receiving an unwanted notice inserted in his electric bill could be adequately served by transferring the notice to the wastebasket and that such an asserted interest could not justify the imposition of a prior restraint on communications. See also

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553-58 (1975).

Furthermore, this Court has repeatedly upheld the First Amendment right of door-to-door soliciting against claims that the home-owner's privacy and security is thereby invaded. See, e.g., Schaumberg and Martin. No real dispute exists that the invasion of privacy associated with receiving a leaflet in the mailbox is far less intrusive than that involved in door-to-door solicitation. Indeed, residents desiring to receive civic notices concerning their neighborhoods are quite likely to find such notices far less intrusive than many of the postage-paid commercial advertisements which appear in their mailboxes.

Appellant's privacy justification for Section 1725 is no different than the privacy defenses which this Court has previously rejected. The government's asserted blanket interest in protecting a uniform privacy interest collapses as soon as it is realized

how different those interests are. Some householders want information and the First Amendment protects their right to receive it. See discussion, supra, at 10-12. Appellant may not substitute its judgment for that of the individual. If an individual homeowner's privacy interests are affected, he or she may exercise the right to decide what information to receive by informing a civic association that he or she no longer desires to receive flyers, or by posting no trespassing signs. In this way, each individual remains free to exercise his own judgment as to whether to receive information. Narrow tailoring requires no less.[13]

In conclusion, Appellant has failed to demonstrate that any of the concerns raised in

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13. Indeed, Congress has already provided a more narrowly tailored remedy for invasions of personal privacy by making it a criminal act for any person to take correspondence from a mailbox "with design to obstruct the correspondence, or to pry into the business or secrets of another." 18 U.S.C. §1702.

its Brief amount to a compelling interest sufficient to justify an abridgment of the First Amendment rights of civic associations and their constituents. This failure to satisfy the compelling interest test should be the beginning and the end of this case. However, since Appellant stresses so heavily the "time, place and manner" test, Amici also will address that standard.

III. ALTERNATIVELY, APPELLANT HAS FAILED TO CARRY ITS BURDEN OF PROOF UNDER THE TIME, PLACE, AND MANNER TEST TO JUSTIFY ABRIDGMENT OF APPELLEES' FIRST AMENDMENT RIGHTS.

This Court's time, place and manner test has several elements. The governmental regulation must be content-neutral, the regulation must be reasonable as this Court has defined that term,[14] there must be ample alternatives

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14. In Grayned v. City of Rockford, 408 U.S. 104 (1972), this Court defined "reasonableness":

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available if no public forum is involved,[15] the subordinating governmental interest must be significant,[16] and the regulation must be narrowly tailored.[17]

This test involves two variations depending upon the nature of the forum. Where a "public forum" is involved, the question of

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> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation we must weigh heavily the fact that communication is involved, the regulation must be narrowly tailored to further the State's legitimate interests." 408 U.S. at 116-117 (footnotes omitted).

See also Schneider v. State of New Jersey, 308 U.S. 147, 161 (1939).

15. Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 327 (1980).

16. Grayned v. City of Rockford, 408 U.S. 104, 115-116 (1972).

17. Carey v. Brown, 65 L.Ed.2d 267, 270 (1980); Grayned v. City of Rockford, supra, 408 U.S. at 116-117; Elrod v. Burns, 427 U.S. 347, 362-363 (1976); Police Department v. Mosley, 408 U.S. 92, 101 (1972).

adequacy of other alternatives is irrelevant to the First Amendment analysis.[18] Schneider v. State of New Jersey, 308 U.S. 147, 163 (1939); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). Where a non-public forum is involved, the single additional element of the applicable test permits a court to consider a governmental showing of the presence or absence of ample and adequate alternatives. Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 326 (1980).

Amici submit that the mailbox represents, for the purpose of the First Amendment analysis,

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18. The existence of different standards depending upon the presence of a given factor, such as a public forum, is consistent with this Court's First Amendment principles. This Court has maintained different First Amendment tests for different factual situations: commercial speech, Central Hudson Gas v. Public Service Commission, 65 L.Ed.2d 341, 348-349 (1980); national defense interests, Brown v. Glines, 444 U.S. 348, 354-355 (1980); expressive conduct, Cox v. Louisiana, 379 U.S. 536 (1965); state educational institutions, Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972); obscenity and youth, Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975); prisoners' speech rights, Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 129-30 (1971).

a public forum. As Appellant states in its brief: "The very existence of letter boxes, after all, depends on the Postal Service." Appellant's Brief, at 18. Not only is the mailbox thus a creation of the federal government, but, as this litigation dramatically illustrates, the Postal Service exercises plenary control over its use through the criminal law. See, e.g., 18 U.S.C. §1725. Because it is government created and controled, the mailbox is dedicated to the public use. As this Court has repeatedly observed, "the use of the mails is almost as much a part of free speech as the right to use our tongues." Blount v. Rizzi, 400 U.S. 410, 416 (1971), quoting from United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting).[19]

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19. See also Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Procunier v. Martinez, 416 U.S. 396, 422 (1979) (Marshall, J. concurring).

The mailbox represents a forum which has traditionally been used as a means of communicating through distribution of printed material. As such, mailboxes are "natural and proper places for the dissemination of information and opinion,"[20] and are a forum presumptively open to free speech unless some basic incompatibility justifies regulation.[21] The leafletting activity of civic organizations using the mailbox is not one inherently incompatible with or one which "frustrates"[22] the normal activity of the forum, i.e., the deposit of written communication in a receptable. On the contrary, Appellees' activity is identical with the normal activity of the forum. As the district court found, the deposit of leaflets

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20. Schneider v. State of New Jersey, 308 U.S. 147, 163 (1939).

21. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Compare Rowan v. United States Post Office Department, 397 U.S. 728 (1970).

22. Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 327 (1980).

in a mailbox is wholly consistent with the normal function of the mailbox in the postal system's operation. 490 F.Supp. at 163.

Amici recognize that the mailbox, unlike wholly public fora such as public sidewalks and parks, is a hybrid. It is governmentally created, controlled and regulated. It serves a use dedicated to the public. Yet, as Appellant notes, technical ownership of the mailbox is private. However, the degree of private citizen control over the mailbox is extraordinarily circumscribed under existing postal regulation. For example, under Appellant's interpretation of Section 1725, a homeowner does not have the right to give a civic association permission to place unstamped circulars in his mailbox. Similarly, except in very limited circumstances, see Rowan, the mailbox owner may not refuse to receive material sent through the mail. His remedy for unwanted mail is to transfer it, after receipt, to the wastebasket. See Consolidated Edison Co. v.

Public Service Commission, 65 L.Ed.2d 319, 331 (1980).

Therefore, Amici submit that the mailbox is most closely aligned with the indicia of public fora which have been articulated in this Court's decisions. Given a public forum, the adequacy of alternatives is not relevant to the judicial inquiry. For the reasons set forth, supra, at 15-33, Appellant has failed to establish that its enforcement of Section 1725 serves any significant governmental interest or that it has narrowly tailored its regulation of important First Amendment rights.

Even if this Court were to conclude that the mailbox is not a public forum, Appellant has still failed to carry its burden of proof. The requirements of showing significant governmental interest, reasonableness, and narrow tailoring are the same as in a public forum case. The only additional consideration in the nonpublic forum circumstance is the adequacy of alternatives. The district court found

that door delivery and similar asserted alternatives were not adequate. 490 F.Supp. at 163. As a practical matter, householders reasonably anticipate that incoming messages will be found in the mailbox. This case presents a situation where the effectiveness of the message depends in great measure upon how it is conveyed. See Young v. American Mini Theaters, Inc., 427 U.S. 50, 78 n.2 (1976) (Powell, J. concurring). As in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), even if other means of communication were equally convenient to use and no more costly, they are less effective in reaching their intended audience and are unsatisfactory alternatives for that reason.[23]

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23. In Linmark, this Court stated: "[S]erious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication.' . . . Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options

[footnote continued on next page]

Whether or not the Court finds the public aspects of the mailbox to be predominant, Section 1725 is not a reasonable time, place, or manner regulation. As previously discussed, Appellant has not carried its burden of showing a substantial governmental interest justifying abridgement of First Amendment rights.

Furthermore, there is no showing that enforcement of the statute actually serves the interests asserted by the government. Distribution of civic leaflets by organizations which do not use the mails can have no appreciable effect on Appellant's commercial monopoly. Appellant has not shown that enforcement of

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[footnote continued from previous page]

> to which sellers realistically are relegated -- primarily newspaper advertising and listing with real estate agents -- involving more cost and less autonomy than 'For Sale' signs; . . . are less likely to reach persons not deliberately seeking sales information, . . . and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold. . . . The alternatives, then, are far from satisfactory." 431 U.S. at 93 (citations omitted).

Section 1725 results in greater security of the mails against theft or fraud than is provided by existing narrowly drawn statutes prohibiting those offenses. There has been no credible showing that civic leaflets will impose any undue burden on postal workers or the mail system by overcrowding the box or otherwise. As this Court held in Bates v. City of Little Rock, 361 U.S. 516 (1960), where First Amendment rights are abridged, the Court must look beyond the asserted purpose of a statute and determine whether the abridgement actually serves a significant governmental interest which cannot be accomplished without infringing on protected liberties.

Section 1725 is further not "reasonable" under the standards set forth in Grayned and Consolidated Edison because civic leafletting is not an inherently incompatible activity which frustrates the usual activity of the

forum. The justification of the reasonableness of a time, place, and manner regulation must rest on a need to accommodate competing values. But no such need exists in the present case.

Although Amici believe that the pulbic forum aspects of the mailbox predominate, Appellant's position is no stronger if the box is deemed a nonpublic forum. Indeed, to the extent that mailboxes are considered to be private, the householder's right to receive civic messages and to determine for himself what communications he desires, as well as his associational rights to band together with his neighbors for civic purposes should weigh even more heavily.

Finally, the absence of any satisfactory alternative has been dramatically demonstrated in the court below. Where communication with residents is choked off, many voluntary non-profit civic associations cease to exist. The First Amendment rights of members of such groups to distribute and receive communications,

to peaceably assemble to petition the government, and to associate for other civic purposes are severely abridged by enforcement of the statute.

IV. SECTION 1725 DOES NOT APPLY TO NONPROFIT CIVIC ORGANIZATION LEAFLETS, AND THEREFORE DOES NOT BAR APPELLEES' USE OF THE MAILBOX

Amici suggest that this Court need not reach the constitutional issues raised here. This is because Section 1725 can be interpreted to allow the Appellees to use the mailbox despite the ban on use by other parties.

The legislative history of Section 1725 indicates that it was aimed at prohibiting the use of private delivery by commercial enterprises in competition with the postal service. The sponsors were especially concerned with the hand delivery of bills by "[b]usiness concerns, particularly utility companies." See, H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934). The language of the statute, itself, prohibits

the deposit of "statements of accounts, circulars, sale bills, or other like matters" without payment of postage. This choice of terminology seems calculated to encompass only commercial communications and not leaflets concerning public issues which pose no competitive threat to the postal service.

In construing Section 1725, this Court should recognize that leaflets delivered by unpaid volunteers are outside the reach of its companion statute, 18 U.S.C. §1696, which is also designed to protect the postal monopoly. The express exception of §1696(c) indicates a congressional intent to exclude noncommercial leafletting from its statutory scheme for enforcement of the postal monopoly under 18 U.S.C. §§1696 and 1725.

It is appropriate for this Court to construe the statute so as to avoid even a serious question as to whether it is constitutional, Crowell v. Benson, 285 U.S. 22 (1932), especially where such a construction is clearly in accord

with the congressional intent as established by the legislative history. Furthermore, a constitutional issue should be avoided where a case may be decided on statutory grounds. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).[24] Amici submit, therefore, that the decision below should be affirmed on the ground that the statute does not apply to the leaflets of non-profit civic organizations such as Appellees.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed and Section 1725 should be declared unconstitutional insofar as it prohibits mailbox distribution by

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24. Additionally, criminal statutes -- such as Section 1725 -- should be narrowly construed, and a legislative intention to reach conduct not clearly proscribed should not be implied. Bifulco v. United States, 65 L.Ed.2d 205, 219 (1980); Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978).

nonprofit neighborhood associations or, alternatively, should be held inapplicable to the mailbox distribution of leaflets by such civic organizations.

Respectfully submitted,

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